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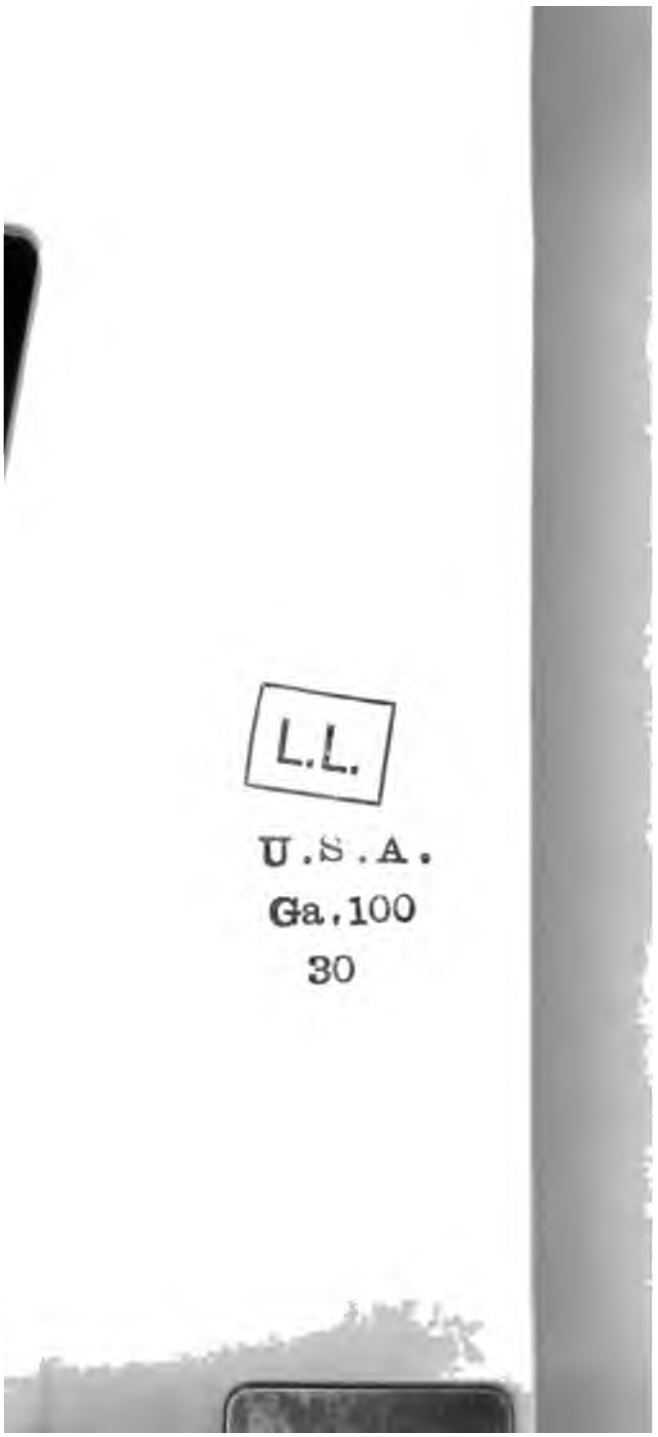
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REPORTS

OF

CASES IN LAW AND EQUITY,

ARGUED AND DETERMINED IN THE

UPREME COURT OF GEORGIA,

AT ATLANTA.

PART OF JANUARY AND JULY TERMS, 1872.

VOLUME XLV.

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OF THE

SUPREME COURT OF GEORGIA,

DURING THE PERIOD OF THESE REPORTS.

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HON. H. K. McCAY, JUDGE,.....*Americus.*
HON. W. W. MONTGOMERY, JUDGE,.....*Augusta.*

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*HENRY JACKSON was appointed Reporter in place of N. J. HAMMOND, resigned, March 30th, 1872.

NOTE.

By Act of 1860 (Revised Code, section 4210), the decision Supreme Court are required to be "announced by a written sy the points decided." These decisions, thus announced from th are, by the Judges, made the head-notes to the cases. Those he followed by (R.) are by the Reporter.

January Term, 1872, opened with but two Judges. Lochran Justice, resigned on December 4th, 1871, and Warner was swo Chief Justice, on January 19th, 1872. The vacancy created by promotion had not been filled. He and McCay presided for o On the 23d of January, Warner, Chief Justice, was sick. McCa under section 3171, Revised Code, adjourned the Court, from da till the 29th of January. Then he went to the room of Warn Justice, with the Clerk and Sheriff of the Court, and the Court journed by them till February 6th; and on that day, at the same was again adjourned till February 12th. Montgomery, Judge, w in on February 8th, to fill the vacancy created by the promotion ner. On February 12th, the Court met at the same place, and d the opinions argued during the first week. McCay, Judge, an gomery, Judge, presided, without Warner, Chief Justice, at th room, from February 13th till the 12th of March, when Warn Justice, resumed his seat.

By section 204, Revised Code, "A decision, concurred in Judges, cannot be reversed or materially changed, except b bench," etc. Those of the cases not decided by a full bench are the words, "By two Judges." All dated prior to and on the February, were before Warner, Chief Justice, and McCay, Jud dated after the 12th of February, and up to the 12th of March, i that date, were before McCay, Judge, and Montgomery, Judge. without date were before a full bench, unless otherwise stated.

The cases contained in this volume, to the 369th page, were by N. J. Hammond; those after, and including that page, b Jackson.

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CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Georgia,

AT ATLANTA,

JANUARY TERM, 1872.

PRESENT—HIRAM WARNER, CHIEF JUSTICE.
H. K. McCAY, W. W. MONTGOMERY, } JUDGES.

WILLIAM R. RUSSELL *et al.*, plaintiffs in error, *vs.* THE STATE OF GEORGIA, defendant in error.

(BY TWO JUDGES.) 1. Where the sureties on a criminal bond, which has been estreated, and on which the usual *sci. fa.* was issued, offer, on a motion to enter up judgment on the bond, at the return term of the *sci. fa.*, to prove the principal is too sick to appear, they should be permitted to do so. The proof made, it would entitle them to a continuance.

2. Where judgment has been entered on such a bond, at the return term of the *sci. fa.*, and, during the term and before the juries were discharged, the sureties brought their principal into Court, surrendered him to the sheriff, offered to pay all costs and excuse themselves for not bringing their principal sooner, by showing his serious illness, and then moved to vacate the judgment, the motion should have been allowed. 5th March, 1872.

Scire facias. Continuances. Before Judge HARRELL. Terrell Superior Court. November Term, 1871.

For the facts, see the opinion.

LYON, DEGRAFFENREID & IRVIN, for plaintiffs in error.

S. WISE PARKER, Solicitor General, by Z. D. HARRISON, for the State.

MONTGOMERY, Judge.

Russell entered into bonds with Woodbright and others as sureties, to answer to various misdemeanors for which he had been indicted in Terrell Superior Court. The bonds were forfeited, *scire facias* issued, and the *scire facias* cases were put upon the motion docket. At the return term of the *scire facias* the cases were called, and the sureties moved to continue, and, for cause, offered to show, by physicians of standing, that their principal was at home too sick to appear. The Court refused to permit them to make the showing, and ordered final judgment to be entered, which was done. During the term, and while a jury was still in attendance, the sureties brought their principal into Court, surrendered him to the sheriff, tendered all costs, and moved to vacate the judgment. The Court refused the motion.

We think there was error in both rulings. The object of the law in requiring bail is to insure the presence of the accused. If he does not appear at the first term, his sureties are then called on by *scire facias* to produce him at the second. If they do so, at any time, before the case is regularly reached in its order on the criminal docket, no final judgment can be entered. If the accused dies before final judgment, the sureties are excused: Code, section 4648. Why? Because it has providentially become impossible to comply with the condition of their bond. Is it not equally so, for the time, at least, if he is too sick to appear? In all cases providential absence of a party or counsel is a good ground for continuance, if the case cannot be safely tried without their presence: Code, 3473, 3474. In the present case the

sureties could certainly not go to trial safely without the presence of their principal. With his presence their defense was complete; without it they had none.

We think the same reasoning applies to the motion to vacate the judgment, the facts showing that there was no negligence on the part of the sureties in failing to avail themselves of the defense before the judgment was rendered. As already remarked, the object of the bond is to secure the attendance of the principal, not to raise money for the State. She, therefore, excuses a compliance with the condition when it becomes, from providential cause and without fault of either principal or sureties, impossible to do so. There seems to be no difference in principle between this case and *Shannon vs. Roosevelt, Hyde and Clarke*, 17 Georgia, 88.

Judgment reversed.

JACOB L. COBB, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

BY TWO JUDGES.—1. When, after the jury was stricken and before the cause was submitted to the jury on an indictment for a misdemeanor, the defendant then first discovered that two of the jurors, not stricken, had been on the grand jury pending the bill of indictment:

Held, That the defendants had a right to a new jury list, with talesmen substituted for the two incompetent jurors, and was entitled to his seven strikes from that list.

2. An indictment charging that the defendant had permitted A. B., a minor, to play or roll billiards on a table kept by him, without the consent of his parents, etc., is not demurrable, as in the alternative; the words play or roll are used in the statute as synonymous. 27th February, 1872.

Criminal Law. Jury. Pleading. Before Judge HARRELL. Randolph Superior Court. November Term, 1871.

The indictment charged that Cobb permitted a minor, without the consent of his parents, "to play or roll billiards," on

Cobb's billiard table. After the jury was stricken Cobb's counsel demurred to the indictment upon the ground that it contained "two distinct offenses." The demurrer was overruled. Before the case was submitted to the jury, Cobb's counsel notified the Court that he had just discovered that one of the jury impanneled to try the cause was of the grand jury who found the true bill. The Court replied that if there was no objection, he might take the last man stricken, and this was done. Cobb's counsel then said he had just discovered that there was another of said grand jury on the stricken jury. The Court suggested that the next last man stricken be substituted for *him*. This stricken juror had been stricken by Cobb, and his counsel objected to taking him, and asked that a new panel of twenty-four men be furnished, and that the whole jury be selected therefrom *de novo*. The Court refused to allow this, and gave him his choice between the last man whom he had stricken or said grand juror. Cobb's counsel took the stricken man, and the trial proceeded. Cobb was convicted. He moved for a new trial because of said rulings and other matters not material here. The new trial was refused, and that is assigned as error.

B. S. WORRILL, for plaintiff in error. The demurrer was well taken: Acts of 1869, p. 145. As to the jury: Constitution United States, Article 1, section 1; 5th Georgia Reports, 85; 17th, 496.

S. WISE PARKER, Solicitor General, by Z. D. HARRISON, for the State.

McCAY, Judge.

It is not the policy of the law to try men for the violation of the law, by jurymen who have formed and expressed opinions from hearing the evidence as to their guilt or innocence. These two jurymen were clearly incompetent, and the fact of incompetency was not known until after the jury was fully

stricken. Under the statute, giving the prisoner seven strikes and the State five from a panel of twenty-four, the prisoner has the first and the last two strikes. We think it was contrary to the spirit of the statute, to force the prisoner to recall his last two strikes, or to consent to be tried by the two grand jurymen. The best and safest course for both the State and the prisoner would have been to make out a new list, leaving off the incompetent men and filling their places by *talesmen*. And this is in harmony with the whole spirit of the criminal law. The jury, thus presented, ought to have been then restricken. It was only a question of time with the Court, and the principles of justice might surely demand that much.

2. We think the indictment good. The words "play or roll" are evidently used as synonymous in the Act creating the offense, and do not describe different offenses. In the case of ten pins, play and roll are commonly used to describe the game; and, though not so frequently, used to describe the game of billiards, yet, sometimes this is the case, and it is not to be supposed that grave members of the Legislature are so familiar with the language used in the games they prohibit, as to use them with technical accuracy.

Judgment reversed.

JOHN W. ELDER, plaintiff in error *vs.* J. A. ALLISON, administrator, defendant in error.

(BY TWO JUDGES.)—1. Misrepresentation of a material fact, made by one of the parties to a contract, though made by mistake and innocently, if acted on by the opposite party, constitutes legal fraud.

2. Where the obligor, in a bond for titles, sues the obligee in ejectment, on failure of the latter to pay the entire purchase-money, and the obligee files a bill alleging a misrepresentation of a material fact by the obligor, at the time of the purchase, as to the area of the land; that he acted on such misrepresentation; that the obligor can make no title to that part of the land so misrepresented as belonging to the

tract sold; and offering to pay into Court whatever may be equitably due, and seeking to enjoin the action of ejectment; which allegations are not denied; the injunction should be granted, and the question as to whether the obligee acted on the misrepresentation of the obligor, or not, should be left to a jury.

3. A defendant in ejectment may set up an equitable defense in his plea, but is not obliged to do so; he may file his bill if he prefer it. 27th February, 1872.

Misrepresentation. Equity Practice. Before Judge HARRELL. Randolph Superior Court. November Term, 1871.

The error assigned in this case is the dismissal of plaintiff's bill upon a demurrer averring, among other grounds, that plaintiff's remedy was complete at law. The averments of the bill are stated in the opinion.

H. FIELDER, for plaintiff in error.

HOOD & KIDDOO, for defendant.

MONTGOMERY, Judge.

The plaintiff alleges in his bill that he bought, through his brother, as agent, from the defendant's intestate, a plantation of three hundred acres adjoining the city of Cuthbert, for which he obtained bond for titles and gave his notes, one payable January 1st, 1870, for $1,900, and the other payable January, 1871, for $1,000. The bond described the land sold by the number of the lots and the district. Among other lots sold and described, was lot number one hundred and sixty-one, in the ninth district, with a reservation to the obligor of some two acres, described as follows: "Commencing at the southeast corner of said lot, running due west seventy yards, thence due north to the Baptist College spring branch, thence eastwardly along the line of said spring branch to east line of lot, thence south to the starting point."

The bond was also conditioned to make titles to "numbers thirty-four, thirty-five, thirty-six and thirty-seven in the

Villa Nova survey, each containing five acres more or less," these latter being town lots within the corporate limits of Cuthbert, but sold as a part of the plantation. At the time of the sale the vendor went over the land with the agent and pointed out the lines as he supposed them to exist. The lines so pointed out embraced about twenty-six acres of valuable wood-land adjoining Cuthbert, including the lots in Villa Nova survey. This land is shown by affidavits accompanying the bill to be of far greater relative value than any other part of the plantation. The plaintiff paid the first note, and then discovered that his vendor had been mistaken as to the eastern boundary of the plantation, and that it did not embrace any of the woodland of twenty-six acres, all of which belonged to other parties, and that the reserved portion, described in the bond as in the southeast corner of lot one hundred and sixty-one, was not in the lot at all, but considerably to the east of the southeast corner, and on land not owned by the vendor.

The mistake arose from the fact that the land sold lay on the southern line of the ninth district, which was the northern line of the sixth district, and it was supposed that the surveyor's lines running north and south in the ninth district, dividing it into lots, were prolongations of similar lines in the sixth district, which was not true, the eastern boundaries of the lots in the sixth district extending several chains further east than those of the lots in the ninth district, immediately north of them. In pointing out lots numbers one hundred and sixty-one and one hundred and sixty, immediately north of it, the vendee had assumed that they extended as far east as the lot in the sixth district immediately south of lot number one hundred and sixty-one.

Upon discovery of the mistake, the complainant refused to pay his last note for $1,000 00, and the administrator (the vendor having in the meantime died,) brought ejectment. The present bill is filed to enjoin that suit and for an equitable abatement of the note. The defendant de-

murred to the bill for want of equity, and the Court sustained the demurrer and dismissed the bill. It would seem from the ejectment case also brought to the present term, though it is not so stated, because the complainant could set up his defense at law by his plea.

Was the Court right in sustaining the demurrer and dismissing the bill? We think not. If the intestate, at the time of sale, made the representations as charged in the bill, and which the demurrer admits, the case falls within sections 2592 and 3117 of the Revised Code, and entitles the party injured to the interposition of a Court of chancery. The case of *Payne vs. Smith*, 20 Georgia Reports, 654, is relied on by defendant to establish the principle that where the means of information as to the area of the land purchased are within the power of the vendee to obtain, a misrepresentation as to the area by the vendor will constitute no ground of relief unless fraudulently made. The Superior Court in that case charged the jury that, "if a wrong line was fraudulently shewn to Panye, (the purchaser,) then Payne would be entitled to the deduction as insisted on by him." And the Supreme Court adopt this as law. Since that decision was rendered, the Code, section 3117, makes the facts, as alleged by the bill in this case to exist, to constitute legal fraud. In that case the defendant offered to rescind the contract, as set forth in his answer. Complainant declined.

Here there is, it is true, a *quasi* offer to rescind upon *conditions*, which emasculate the offer. While a defendant at law *may*, by his plea, set up any equitable defense he has to the action at law, he is not obliged to do so. If the rule that where there is an adequate remedy at law, equity has no jurisdiction, be applied to this extent, Courts of equity would be abolished in Georgia.

Judgment reversed.

J. A. ALLISON, administrator, plaintiff in error, *vs.* JOHN W. ELDER, defendant in error.

BY TWO JUDGES.—A defendant in ejectment may set up an equitable defense by way of plea in Georgia.

Evidence which is relevant to the equity case thus made is properly admitted.

When a defendant who is the obligee in a bond for titles, and is sued in ejectment by obligor to recover the land on the defendant's failure to pay the entire purchase-money, files an equitable defense, it is error in the Court to dismiss the case because the plaintiff declines to amend his declaration so as to change his action to assumpsit for the recovery of the purchase-money. 27th February, 1872.

Ejectment. Evidence. Amendment. Before Judge HARRELL. Randolph Superior Court. November Term, 1871.

Allison, as administrator of Key, brought ejectment against Elder. Elder pleaded the general issue. On the trial it was admitted that Key had titles to the land, and that Elder had possession of it when the suit began, under a bond for titles from Key. That bond was in evidence. It stated that Elder had paid Key $100 00 and given his notes for $1,900 00 and for $1000 00, and obligated Key to make him titles when said notes were paid. Allison testified that Elder had paid the $1,900 00 note to him, and gave evidence as to mesne profits. Defendant amended his plea by averring that he bought said land, took said bond and gave his notes as aforesaid, and had paid as aforesaid, but that he had not paid the $1000 00 note because Key, being mistaken in his boundary line, had pointed out and undertaken to convey to him, Elder, certain land which Key did not own, which was worth $1000 00, or some such sum. (The ejectment was to recover the same land covered by the bond mentioned in the foregoing case, and the amended plea set forth as an equitable defense the averments of the bill which had been dismissed on demurrer.) Defendant then moved to non-suit plaintiff.

Pending that motion, plaintiff's counsel said he would withdraw the evidence as to payment of the $1,900 00, be-

cause it was irrelevant, but the Court would not allow it. He then demurred to said amended plea, but the demurrer was overruled. The Court then asked him if he would so amend his action as to make it assumpsit for the $1000 00, and see whether he could recover under the circumstances. He declined to do this, and the Court granted the non-suit. These rulings against plaintiff are assigned as error.

HOOD & KIDDOO, for plaintiff in error.

H. FIELDER, for defendant.

MONTGOMERY, Judge.

This action was brought by the administrator to recover certain lots of land sold by his intestate to defendant, John W. Elder, for $3,000 00, of which $2,000 00 had been paid. Defendants refused to pay the balance on account of alleged defect of title in the intestate to part of the land purchased. Bond for titles had been given. The condition of which defendants alleged the administrator could not comply with, on account of said defect in the titles, and that the part of the land to which the estate had no title was much more valuable per acre than any other, and that the amount so lost was worth $840 00.

The administrator testified that $2,000 00 of the purchase-money had been paid by the defendant. After the plaintiff had closed his testimony, defendants amended their plea by setting forth the facts as above detailed, having at first pleaded the general issue only, and moved for a nonsuit. Plaintiffs then moved to rule out that part of the administrator's evidence which proved payment of the first note for $2,000 00, as irrelevant. Plaintiffs motion was overruled. Plaintiff then demurred to the amended plea, and moved to strike it. This motion was also overruled. The Court granted plaintiff leave to amend his declaration so as to change it from a suit in ejectment to assumpsit to recover the balance of the purchase-money. Plaintiff declined so to amend, and

the Court granted defendant's motion for a non-suit. Plaintiff excepted: 1st. Because the Court erred in refusing to rule out the evidence of the administrator as to payment of the $2,000 00 note for irrelevancy. 2d. Because the Court erred in overruling the demurrer to the plea, and 3d, in ordering a non-suit.

We think the Court was right in overruling the motion to strike the amended plea. This Court has decided that, under our system of practice, a defendant may set up an equitable defense to an action at law by plea, and the defense set up in this case was one, which a Court of equity, under the English practice, would take cognizance of. The ruling of the Court being right on this point, the evidence of the administrator as to part payment was relevant to the equitable defense set up by the plea. Upon the third assignment of error, however, we think the ruling wrong. The plaintiff had the right to go to the jury and make whatever defense was available to him as a defendant in equity whose action of ejectment was enjoined.

Judgment reversed.

L. ROONEY, plaintiff in error, *vs.* MARY SAMMIS *et al.*, defendants in error.

BY TWO JUDGES.—Where a motion to dismiss a pending suit was made, on the ground that no affidavit was filed as required by the first section of the Act of October 13th, 1770, and the record showed that the note was payable to Richard Sammis, with no words of negotiability, and the suit was in the name of two females, administratrixes and sole heirs at law of Richard Sammis, and it was in proof that the plaintiffs were widows and sole heirs of Sammis, and the Court refused to dismiss the suit:

Held, That the proof that the plaintiffs were the owners of the note in *their own right* is not entirely satisfactory, yet, as the Court was satisfied with the proof, this Court will not disturb the judgment, leaving it to the parties more fully to test this question of the true, equitable ownership of the note before the jury on the trial. 5th March, 1872.

Tax. Relief Act of 1870. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1871.

Mary Sammis and Phebe Alford sued Rooney upon his note made in 1863, payable to the order of Richard H. Sammis, averring that they were his executors and his sole heirs at law, and that said note was solely theirs. They filed no affidavit as to payment of taxes under the Act of 13th October, 1870. For want of such affidavit defendant's counsel moved to dismiss the cause. He admitted that plaintiffs were widows and sole heirs at law as they averred. And thereupon the Court refused to dismiss the cause. The defenses sought to reduce the recovery upon the ground that said note was a Confederate contract, etc. The jury found for plaintiffs. Defendant moved for a new trial, upon the grounds that the Court erred in not dismissing the cause, and because the verdict was too large. The refusal of a new trial is assigned as error.

M. H. BLANFORD, for plaintiff in error, relied on said Relief Act.

PEABODY & BRANNON, for defendants, said they were excepted therefrom: 42 Georgia Reports, 514.

McCAY, Judge.

We think there was no error in the Court in refusing to dismiss this case. The proof is not entirely satisfactory that these widow ladies are the owners of this note in their own right, but there was sufficient to justify the Court in sustaining the suit. The whole matter was for the jury. There was at least a *prima facie* case, so that the Judge did rightly in refusing to dismiss it. If the jury are satisfied on the proof that may be made that the true owners of this note are these widows, the case is within the exceptions to the Act.

Judgment affirmed.

M. J. JONES, plaintiff in error, *vs.* A. C. McGEHEE *et al.*, defendants in error.

BY TWO JUDGES.—When a *fi. fa.* founded on a debt due before June, 1865, was about to proceed to levy, and the plaintiff, in lieu of the affidavit required by the 5th section of the Act of October, 1870, filed an affidavit that the judgment, which was in his own name, as well as the debt on which it was founded, belonged, in fact, to one who was a minor, and who continued a minor until the spring of 1870, and the levy being made, the Judge of the Superior Court, on motion, dismissed the same:

Held, That the affidavit did not show that the note belonged to one who was a minor at the date of the Act, and that there was no error in dismissing the levy. 5th March, 1872.

Taxes. Relief Act of 1870. Minors. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1871.

In July 1870 a *fi. fa.* was issued in favor of M. J. Jones, upon a judgment obtained in 1870 against McGehee *et al.* On the 20th of October, 1870, Jones made an affidavit that said *fi. fa.* belonged to his ward, Ella S. Jones, and was founded upon a note bought by him as such guardian in 1860, and said note was ever since held by him as such guardian, and that Ella was a minor till the spring of 1870. This affidavit was attached to the *fi. fa.*, and it was then levied upon defendant's property. They filed no counter-affidavit. A motion was pending in said Court to set-off certain losses of defendants against this judgment under the Relief Act. When it was called, though Jones was ready to prove the facts stated in his affidavit, upon motion of defendant's counsel, the Court dismissed the levy because Jones had filed no affidavit of having paid all taxes due on said debt as required by the Relief Act of 13th October, 1870. This is assigned as error.

PEABODY & BRANNON, for plaintiff in error.

BLANFORD & THORNTON; J. M. RUSSELL, for defendants.

McCAY, Judge.

It would be stretching the fourteenth section of the Act of October 13th, 1870, very far, to say that by widows or minors was meant any who had at any time been widows or minors. It is giving the Act perhaps a fair construction to say that by widows and minors it means such as were widows or minors at the date of the Act. This is going as far as we feel inclined to do.

Under this rule, the judgment must be affirmed, since the proof shows that the equitable owner was not a minor at the date of the Act.

Judgment affirmed.

WILLIAM C. DAWSON, plaintiff in error, *vs.* IVY & GARRARD, defendants in error.

BY TWO JUDGES.—A suit against a warehouse man for failing, in 1866, to deliver to plaintiff two certain bags of cotton, which had, in 1864, been deposited in defendant's warehouse, under a contract then made to deliver them when called for, is not within the provisions of the Act of October 13th, 1870, in relation to the payment of taxes. Until the demand and failure to deliver there was no taxable debt, owing from the defendant to plaintiff. 5th March, 1872.

Taxes. Relief Act of 1870. Tried before Judge JOHNSON. Muscogee Superior Court. May Term, 1871.

Dawson averred that, in 1864, he delivered to Ivy & Garrard, as warehousemen, for safe keeping and redelivery to him on demand, certain cotton, that he demanded the same from them on the 1st of January, 1866, and they did not deliver it. He filed no affidavit as to taxes being paid on said debt. For want of such affidavit, defendant's council moved to dismiss the cause. Plaintiff's council replied that plaintiff resided out of the State, and did when said contract was made, (which

he was prepared to prove) and said, besides this, that the cause of action arose since June, 1865, and therefore the Act of 1870 did not apply to it. The Court dismissed the cause. That is assigned as error.

PEABODY & BRANNON, for plaintiff in error, relied upon Winter *vs.* Epping, June Term, 1871.

No appearance for defendant.

McCAY, Judge.

In the view we have taken of the Act of October 13th, 1870, we have considered the Act only to apply to such debts as were taxable before the 1st of June, 1865; that is, such debts then existing as taxable property, and the test we have applied has been, was the right of action now sued on a taxable debt, due or undue, before the 1st of June, 1865?

This case and the case of *The Southern Express Company*, at this term, present this point distinctly. In this case the defendants had undertaken, by *contract*, to keep safely and deliver to the plaintiff two bags of cotton. Evidently here was no debt taxable, so long as the cotton was safely kept and ready for delivery. The cotton was the property of the plaintiff, and the presumption is that he gave that in and paid the taxes thereon until it was lost or converted. So that he had nothing but his right of action on the contract of the warehouseman. That, in this case, became evident only on a demand for the cotton and a failure or refusal to deliver, and this failure did not take place until after June, 1865. In the other case, the Southern Express Company had broken its contract before 1865. The goods were gone, the owner would never think of paying taxes on them. He had only his debt or right of action on the contract of the company, and we see no reason why that was not, under the circumstances, just as much property subject to taxation as any other property. True, it depended upon proof as to whether

the company had or had not kept its obligation, but this is the case with all debts. The difference is only in the mode of proof. This debt against *the company* existed as property before June, 1865, and comes within the rule.

Judgment affirmed.

AARON ALEXANDER, plaintiff in error, *vs.* THE SOUTHERN EXPRESS COMPANY, defendant in error.

By TWO JUDGES.—An action against an Express Company for a breach of contract, in failing to deliver plaintiff's goods according to contract, when the failure to deliver, as well as the contract, is alleged to be before June, 1865, is within the Act of October 13th, 1870, and affidavit must be filed as required by the 1st section of that Act. 5th March, 1872.

Taxes. Relief Act of 1870. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1871.

In February, 1864, Alexander brought suit in which he averred that in March, 1863, at Mobile, Alabama, and Charleston, South Carolina, he entrusted certain goods to said company as a common-carrier, to be delivered to him at Columbus, Georgia, and that the company failed to deliver them, to his damage, etc. He had filed no affidavit as to payment of taxes on this debt as required by the Act of 13th October, 1870, and for that the Court dismissed the cause. That is assigned as error.

L. T. DOWNING, for plaintiff in error.

SMITH & ALEXANDER, for defendant.

McCAY, Judge.

Under the construction we have given to the Act of October 13th, 1870, we are of opinion that this debt was taxable

property on the 1st June, 1865. In the case of *Dawson vs. Ivy & Gerrard, supra*, we have specially alluded to this case, and stated our reasons for holding this debt to be such an one as is covered by the Act.

DANIEL S. ANDERSON, plaintiff in error, *vs.* JAMES S. WILSON, defendant in error.

(BY TWO JUDGES.)—1. The first, second, third and fourth sections of the Act of 18th October, 1870, requiring the plaintiff in suits founded on debts contracted before the 1st of June, 1865, to prove that all legal taxes due thereon have been paid before he is entitled to a judgment, does not apply to the plaintiff in *fi. fa.* in a claim case, if the affidavit is made, that justifies the levy, and the claimant cannot require proof unless he make an issue by a counter-affidavit, denying that the legal taxes have been paid.

2. In a claim case, the plaintiff in *fi. fa.* is a competent witness under the Evidence Act of 1866, Revised Code, 3798, notwithstanding the defendant in execution may have died or become insane. The defendant has no interest in the result of trial, except with the plaintiff. 12th February, 1872.

Claim. Party as witness. Relief Act of 1870. Before Judge PARROTT. Cobb Superior Court. October Term, 1871.

In September, 1861, Anderson obtained a judgment against Heggie, principal, and Husk, security, for $1,075 00, with interest from the 1st of January, 1861. The *fi. fa.* issued upon said judgment was levied in March, 1869, upon certain property as Husk's property. This was claimed by Wilson. In April, 1871, Anderson made an affidavit as to the payment of taxes as required by the Relief Act of 1870, and filed it in office. In October the cause was tried.

It was admitted that Husk had owned the property since the rendition of the judgment. Plaintiff's counsel read in evidence said *fi. fa.* and affidavit, and then offered Anderson, as a witness, to prove by him that he had paid all legal

taxes due on the debt. He was objected to upon the ground that Husk was insane. It was shown that Husk was "imbecile and wholly incapable, from a decay of mind, to transact any sort of business or to recollect transactions in the past." Thereupon the Court held Anderson to be incompetent to testify in his own behalf. And because no other evidence of the payment of taxes was offered, he dismissed the levy. Both these decisions are assigned as error.

LESTER & THOMSON, for plaintiff in error. Relief Act does not apply to claim cases. Anderson was competent, maugre Husk's insanity: 10 Ga. R., 568; 11th, 423.

IRWIN & ANDERSON, for claimant. The Relief Act does apply to claim cases. Anderson was not competent, Husk being insane: Revised Code, section 3798; 37 Ga. R., 118. Payment of taxes cannot be shown by *oral* evidence, (Revised Code, section 3707,) unless the written evidence is accounted for.

McCAY, Judge.

1. We do not think the first section of the Act of October 13th, 1870, applies to plaintiffs in *fi. fa.* on the trial of a claim case. That section, as well as the second, third and fourth sections of the Act clearly contemplates plaintiffs seeking a *judgment* upon their *claim*. The whole language is inapplicable to a claim case; it is the *claimant* who brings a claim case into Court, and if the *action* is to be dismissed, it would be the claim that would fall. The levy is an independent thing; *it* is legitimate and lawful, after the affidavit is filed according to the fifth section. The *issue* is upon the liability of the property levied on to the lien of the judgment. True, the claimant may show that the *fi. fa.* is discharged, but he cannot go behind the judgment. We will not say that the claimant might not, by denying the truth of the affidavit, open the question as provided in section fifth of

the Act, since as he may do this as an independent thing, there would seem to be no good reason why he might not make it a part of his claim case. But we are clear that if the affidavit has been made so as to authorize the levy, the plaintiff has a right to *proceed with his levy*, unless he is met with a counter-affidavit.

2. The proceeding in a claim case is peculiar—the real parties are the plaintiff and the claimant. It is their rights alone that are settled by the verdict. The defendant, if he has any interest at all, is interested with the plaintiff. He is not a party in any substantial sense. His *admissions*, as a general rule, are inadmissible for either party; his death does not abate the proceeding. If the claimant were to prove the *fi. fa.* paid off, it would still stand open against the defendant; the verdict of the jury would be no evidence for him.

We do not, therefore, think the exceptions in the Evidence Act apply in case of the death or insanity of a defendant in *fi. fa.* in a claim case.

We should hesitate much before we should exclude the party from testifying upon the payment of taxes on his claim because of the death of his opponent. The issue cannot be fairly said to be on any matter arising, or on trial between them. It is a preliminary investigation collateral to the main issue and not made by the pleadings. It is, too, a matter known, in fact, in most cases only to the plaintiff and can be proven only by him.

For these reasons we think the Court erred in dismissing the levy.

Judgment reversed.

A. A. Beall, plaintiff in error, *vs.* The Marietta Paper Mill Company, defendant in error.

By two judges.—1. When in a proceeding to foreclose a mortgage the defendants' plea was defective, and he was allowed until the next day to perfect it, and on the calling of the case the next day, further time was asked for to perfect the plea on the ground that one of the counsel, who was also interested as a party, and who alone knew the facts sufficiently to make the amendment, had, that morning, been granted leave of absence by the Judge for the day, and the Court refused to give the time, and allowed the rule to be made absolute, and a motion was made to set aside the judgment:

Held, That the motion to set aside, which was heard and determined by a different Judge, ought not to have been granted without a distinct statement, supported by affidavit, setting forth a substantial defense and showing affirmatively that the defendant had been injured by the absence of his counsel.

2. *Held, also*, That, as there is nothing in the motion to set aside the judgment, or in fact before the Judge on the hearing of the same, to show affirmatively that, if a new trial was had, the defendant could show any substantial defense, it was error in the Court to grant the motion. 13th February, 1872.

New trial. Absence of counsel. Before Judge Parrott. Cobb Superior Court. October Term, 1871.

At October Term, 1869, of said Court a rule *nisi* was granted in favor of Beall for foreclosure of his mortgage against the Marietta Paper Mill Company, a corporation. Defendant, by its agent, Hammett, pleaded that it was entitled to a deduction on said mortgage, "amounting to $1,000 or more, in specie, but the exact amount of which he does not know, because it is based upon facts exclusively within the control of plaintiff;" for that on the ..... day of ....., 186.., John T. Burkhalter, the then agent of said company, entered into a contract with said plaintiff, by which he "consigned to plaintiff ..... bales of cotton, with the express understanding and agreement that said plaintiff was to have said cotton shipped to Liverpool, England, and sold, and that plaintiff should receive therefor the

usual commissions charged by forwarding and commission merchants; but, in violation of said contract, plaintiff shipped said cotton to New York to ....., and through them to Liverpool, at a largely increased cost to said defendant, the said ..... having exacted and received their commissions, etc., as though they had been the original factor of said company, while, at the same time, plaintiff charged and received full commissions for shipping and selling said cotton, thus doubling the expense," etc. This plea was signed by Lester & Thomson and J. R. Brown, defendant's attorneys. On the 4th of October, 1870, this plea was stricken, on demurrer, for uncertainty, and a rule absolute was asked for. A day was given to defendant to amend. On the next day, no amendment having been filed, the Court allowed a rule absolute to be taken. On the 7th of October, 1870, William R. Phillips made affidavit that he was the leading counsel, for defendant, in said cause; that the preparation of the cause had been entrusted to him by Faw, agent; that he directed the filing of said plea, but was unable to get the statement of account upon which said note and mortgage were given, which statement had been in the hands of one Robert, the company's agent, though diligent effort was made to get it; that he had not notified plaintiff to produce a copy of it, because plaintiff's interrogatories had been sued out by plaintiff, and crossed particularly by defendant, to which plaintiff was required to attach such copy; and that he expected to show, by plaintiff's evidence, the overcharges in commissions and the amount due the company for exchange not allowed in said settlement; that said note was largely increased by usurious rates of interest in renewing the same, but he (defendant) "did not then or now propose to claim any deduction for this interest, except as it was founded on a sum not due plaintiff;" that without this statement he could not fill the blanks in said plea, and "he hoped to show," on the trial, that defendant was entitled to a credit by reason of the facts, but for how much he could

not say; that plaintiff's interrogatories did not come in till Monday; that on Tuesday he was, by Judge Knight's consent, engaged in an important cause for the government, which prevented his amending the plea; that the next day he had leave of absence from said Court, and felt assured the cause would not be tried.

J. R. Brown stated, in his place, that said rule absolute was opposed because Phillips was leading counsel in said cause and a large stockholder in said company; that he and Lester & Thomson brought this fact to the notice of the Court, admitted that the plea was defective, but said that they could not amend it without Phillip's presence, and could not go to trial safely in his absence; that Phillips said there was a good defense to said cause, and he (Brown) believed it was so; that Phillips had gone to Atlanta to represent the United States against parties charged with stealing some of the government's money at Marietta, under a leave of absence, and with the assurance that his causes would not be tried that day; and yet the Court allowed the rule absolute to be taken.

Faw stated that he knew not the facts necessary to amend the plea, and that the preparation of the cause had been entrusted to Phillips. Thomson stated, in his place, that Phillips was present when he made out the plea, and that said blanks were left for want of the papers by which to fill them.

Upon these facts, the Court, in the absence of plaintiff and his counsel, granted a rule *nisi*, calling on plaintiff to shew cause why a new trial should not be granted.

In answer to this rule, defendant said as follows: At the regular judgment term the cause was continued, because Phillips had leave of absence, though no plea was then filed. When the plea was demurred to, Phillips was present, and asked time to amend it, and the Court gave him till ten o'clock A. M. the next day. When the cause was called next morning, Colonel Brown said, Phillips was a large stockholder, was absent by leave, and he alone knew the facts by

which to plead. Brown added that Phillips was leading counsel for defendant. The Judge replied, that his name was not marked upon the docket, nor signed to said plea, and that the leave of absence was not intended to cover this cause. Plaintiff's counsel said if defendant's counsel would state in their places that they believed there was any defense, he would let the case go by. Lester & Thomson, who filed this plea, would not so state, and Brown said only that he believed there was a defense because Phillips had said so. Thereupon the Court allowed the rule absolute to be taken.

Subsequently said rule *nisi* to set the judgment aside was taken. It was not served upon defendant's counsel; the Clerk says he mailed them a copy, but they did not get it. Hearing that something existed which prevented the proceeding of the *fi. fa.*, plaintiff's counsel went to the Court, in April, 1871, and there found this motion. By consent, an order was taken to hear said motion in vacation, Phillips and Lester being then and there notified that as yet no defense had been filed and no ground for a defense shown in said motion, and it was put in the order that they might amend, and that plaintiff might insist upon a want of service in said cause, notwithstanding this consent.

In August, 1871, at Chambers, the parties met and Judge Knight, before whom all the foregoing proceedings were had, postponed the hearing till Term time. At the Term, Judge Parrott presided. On the hearing before him, plaintiff's counsel read said papers and the said answers of plaintiff to interrogatories. Of them it is sufficient to say that they were in Court and opened when the plea was demurred to as aforesaid; they had attached to them a copy of the account which was rendered to Robert, agent of defendant, all defendant's correspondence touching said cotton and an absolute denial of any and everything giving color to said stricken plea, *i. e.*, they stated that the cotton was never sent to New York, and no double commissions had been charged. From them it appeared

that some usury had been added on the various renewals of the notes, but it was not clear whether this was in the renewals to Beall or to the bank, where they had gotten money with Beall as their indorser. Beall had had to take up the company's note in bank, and they gave this note and mortgage to cover his payment to the bank, and from time to time renewed Beall's note also. After argument had, the Court granted a new trial. And upon a motion to continue the cause by defendant, it was continued. The grant of a new trial is assigned as error.

A. W. HAMMOND & SON, for plaintiff in error. As to service of rule: Revised Code, section 3673; 21st Ga. R., 216; 13th, 204. Continuance for absence of counsel': Revised Code, section 3474; 10 Ga. R., 87; 16th, 526; 18th, 388; 31st, 46. New trial not granted unless it *appears* that there is a probability of different result.

LESTER & THOMSON, for defendant.

McCAY, Judge.

We recognize fully the rule that the act of the Court ought not to injure any one. And did it appear to us that the defendant had been damaged by the refusal of the Court to recognize the leave of absence of Mr. Phillips, however unjust such a leave might have been to the plaintiff, we should affirm this judgment, setting aside the rule absolute. But it is not clear to us that Judge Knight was not in the right in refusing to delay the case for the absence of Mr. Phillips.

When the case was called, the day before, the plea was stricken out, because the sum claimed to be abated from the note was left blank, so that there was in fact no plea. The defendants was given until next day to perfect the plea from the interrogatories of the plaintiff then in Court. That Mr. Phillips got leave of absence next day, was no excuse for not perfecting his plea. It might easily have been done

on the day the case was first called; it might have been done that night. The thing to be done was office work, the examination of the plaintiff's interrogatories, and from them perfecting the plea. A leave of absence of an attorney from the Court-house, on agreement that his cases shall not be tried, is strained very far when it is used to pass cases when there is no plea. Had Mr. Phillips perfected this plea, and thus had an issue before the Court, his rights to have the case passed would have been very clear. But we can well see how Judge Knight may have felt that his leave of absence could not fully excuse the failure to perfect the plea which might well have been done notwithstanding the leave.

But, as appears from the record, there is *yet no statement under oath of a substantial defense.* The claim of an abatement of the plaintiff's demand is still only insisted on in a loose, indefinite way. No specification is made and definite amount fixed.

Mr. Phillips is dependent on the plaintiff's answer for his defense. That he admits, and yet, having it before him, he fails even yet to point out in what respects and to what amount the note exceeds the proper indebtedness.

As appears to us the plaintiff's answers show the note to be right, and that, in the two respects mentioned in the plea, to-wit: the commissions and the exchange, there is no error. Nothing is set forth in the motion in denial of the plaintiff's answers, nor does it appear at all that, if Mr. Phillips had been present, it would have been possible for him to perfect the plea so as to set out a substantial defense.

It would be grossly unjust to the plaintiff to delay him in the mere abstract proposition that Judge Knight had given Mr. Phillips leave of absence, and then went on with this case in spite of the leave. It ought to appear, in some satisfactory way, that a wrong has been done; that Mr. Phillips, if present, could have helped the defendant's case. This is not the absence of an attorney at the trial, when the loss of his skill and learning is manifest. The damage here is, that

Mr. Phillips, in consequence of this leave, failed to amend and perfect the plea. Could he have so done if present?

We think this ought to have appeared in the motion—such facts of defense as made a good plea ought to have been stated and sworn to—plenty of time was given for this; a special consent that the motion might be amended was entered into. Yet still, no definite, distinct facts are set up; and if the plaintiff's answers are true, it would appear that no such defense can be set up. It is true, that it is apparent that a part of this note is for interest at more than seven per cent. But even in the stricken plea no defense of usury is set up, nor is there in any of the motions any claim to put the defense on this ground.

In our judgment, therefore, Judge Parrott erred in setting aside the judgment, for the simple reason that it is not made to appear that the plea *can* be truthfully amended so as to present a substantial defense.

Judgment reversed.

THE WOOD HYDRAULIC HOSE MINING COMPANY, plaintiff in error, *vs.* HARVEY KING, defendant in error.

(BY TWO JUDGES.)—1. Although a corporation, as such, can do no corporate act out of the limits of the State granting its charter, yet its agents and officers may bind it by contracts and engagements made in other States, and the minutes of its board of directors may be used as evidence of the acts of the board, even though the meetings of the board appear to have been held out of the State chartering the corporation.

2. It is a necessary incident of a mining corporation that it shall have power to contract and to bind itself to those dealing with it in matters within the intent of the charter, even though the charter contains no express grant or power to contract or make debts.

3. The directors of a corporation, unless expressly restrained either by the charter or the by-laws, may exercise the ordinary powers of the corporation.

4. A corporation which, through its directors, accepts the services of

another as treasurer, and ratifies and audits his accounts, in which a balance appears against the corporation, is bound by the admission, as a private person would be, under the same circumstances.

5. When the treasurer of a corporation, with the knowledge and consent of the directors, raised money for the use of the corporation, on his own credit, paying interest therefor above the legal rate, and his accounts, as treasurer, were audited and agreed to by the company, of extra interest appearing on the account, and a balance struck and agreed to as due the treasurer, a verdict of a jury for the balance, with legal interest from the date of the account, is not legal.

6. When the Judge who presided at the trial refuses to grant a new trial, on the ground that the verdict is contrary to the testimony, it must be a very strong case, indeed, to justify this Court in overruling the judg ment. 12th February, 1872.

Corporation. Evidence. New Trial. Before Judge PARROTT. Lumpkin Superior Court. September Term, 1871.

King brought assumpsit against said company, a corporate body of this State, for his services as its treasurer, and for money paid out by him for the company to carry on its mining operations in Georgia. The defenses were *non assumpsit* and that King had failed to perform his duty. King was examined by interrogatories and swore to the correctness of his account, and, to fortify his testimony as to money paid out by him for the company, he produced receipts signed by the parties to whom he paid the said money. He also attached to his answers copies of the action of the board of directors, held in their several meetings, in Boston, Massachusetts. He admitted that it required certain usury to make up the sum total of his account, but said that he had had to pay out usury for the company, with the knowledge and approbation of the directors, and that they submitted his accounts to an auditing committee, who reported that his claim was just and due, and that the directors adopted said report. The report copied from the minutes was also attached to his answers. He denied any and all facts going to make up the defense.

These interrogatories were objected to, upon the grounds

that there was higher evidence, in writing, of the facts therein stated; because King's authority to contract debts against the company must be shown by the records of the company; because the vouchers for money paid out were but the written statements of third persons, and because the company was not bound by the action of its directors out of this State. The objections were overruled, and the testimony was read to the jury.

For the defendant there was evidence tending to show that King had failed to attend to his duty, and to set up a contract made by him as to taking pay on stock which King had denied, as stated by them.

1. Defendant's counsel requested the Court to charge the jury that if King, while treasurer of said company, transcended his authority in running the company in debt, by advancing the money himself, when he was authorized to sell stock to raise funds for the operations of the company, and negligently failed and fraudulently refused to put the stock of the company on the market, for that purpose, when requested so to do, and at the same time he could have sold the same at $5 per share, the defendant is not liable.

2. That if the jury were satisfied, from the evidence, that King, the plaintiff, whilst he was treasurer of the company, so managed to depreciate the value of the stock or designedly withheld the same from market, with a view to advance his own individual interest, and not the interest of the company, and he, at the same time, advanced money in order to keep the said stock from the market, then defendant is not liable, as the plaintiff cannot take advantage of his wrong.

3. That, if the jury are satisfied, from the evidence, that the evidence of the plaintiff does not correspond with the account of the plaintiff and sustain his claim, then you must find for the defendant.

The Court refused so to charge, but on the contrary charged the jury as set forth in the fifth, sixth, seventh, ninth and tenth grounds for a motion for new trial as hereafter set forth.

The jury returned a verdict for King for $10,651 63, principal, and $2,187 12, with cost of suit. Whereupon counsel for defendant moved for a new trial on the following grounds:

1. Because the Court erred in admitting the interrogatories of King as evidence.

2. Because the Court erred in admitting in evidence the vouchers of Harvey King, treasurer of the said company, as evidence for the plaintiff to prove his individual account.

3. Because the Court erred in admitting the report of a committee of stockholders, composed of E. F. Hodges, Joseph Murdock and N. H. Hand, made and reported at a meeting held in the city of Boston, and State of Massachusetts, on the 23d September, 1868.

4. (Withdrawn by leave of the Court.)

5. Because the jury found said verdict contrary to the charge of the Court in this: 1. A corporation act and do business by its officers and agents, and these officers and agents derive their powers from the charter, by-laws and votes and resolutions of the corporation. The mode by which corporations manifest their assent, make contracts, etc., is by their common seal or by vote of the company, or by contract, or agreements of their legal authorized agents. If you are satisfied, from the evidence, that the corporation did not contract this debt by legal votes of the company, or by its legal authorized agents, the company is not liable, and therefore you must find for the company. 2. In this, that the charter, by-laws and resolutions of the company must be strictly pursued by the officers and agents, and if they transcend their authority, the company defendant, is not liable. 3. If you are satisfied, from the evidence, that the directors had no legal authority from the stockholders to borrow money through the treasurer, the action of directors authorizing the treasurer and plaintiff to borrow or advance the same, are void, and therefore plaintiff cannot protect himself under the action of the board of directors. For when directors are made agents to do anything for the company, they must follow strictly the

charter, vote and resolutions giving them authority. 4. That the principal is bound by all the acts of his agent within scope of his authority. If the agent exceeds his authority the principal cannot ratify in part and repudiate in part. He must adopt either the whole or none. 5. If you are satisfied, from the evidence, that the defendant, by its legal agent, borrowed money, or the plaintiff advanced the money as agent of the defendant, then the defendant is liable; but if you are satisfied that the money was borrowed or advanced without authority from the principal, then the defendant is not liable. 6. That the principal may ratify the acts of agent; the ratification relates back to the act ratified, and takes effect as if originally authorized; so if you are satisfied, from evidence, that King, the plaintiff, was not legally authorized to borrow or advance the money, the defendant may afterwards ratify his acts, and the ratification may be express or implied from the acts or silence of the defendant, and the ratification once made, cannot be revoked. 7. That the usual mode of proceeding in bodies, or companies, where transactions of business are done through committees appointed, is that the subject-matter to be acted upon by the committee is referred to a committee, they, by its chairman, makes its report. The report is accepted or received by the body; then the report is adopted by the vote of the body; so if you are satisfied that the report of the committee in which the plaintiff's claim was audited was accepted and adopted by the vote of the company, defendant, then the defendant is liable, and you must find for the plaintiff; but, if you find the money was borrowed without authority, and the act was not ratified, you must find for the defendant. 8. The jury is only authorized to allow the plaintiff seven per cent. interest under the law on his claim, and you will, if you are satisfied the plaintiff is entitled to recover, calculate the interest on the amount due at the rate of seven per cent. 9. If you are satisfied, from the evidence, that the plaintiff has, by neglect or bad management, or the failure to do that which he was bound

to do in his office, damaged defendant in any certain amount, which must be ascertained by proof, then the defendant is entitled to recover of the plaintiff the amount in this action by way of recoupment.

6. Because the Court erred in refusing to charge the jury as requested as aforesaid.

7. Because the Court erred in charging the jury that "the eighth by-law of the company is, when the directors shall deem best, in their judgment, to make contracts, borrow money and run the company in debt by giving the company notes or otherwise," and if you are satisfied, from the evidence, that the directors acted according to the best of their judgment for the best interest of the company, and authorized the treasurer to borrow or advance the money, unless such action, or borrowing money, or contracting, was contrary to the charter," (it binds the company.)

8. Because the Court erred in charging the jury that if they were satisfied, from the evidence, that the plaintiff borrowed or advanced the money sued for while agent of the defendant, and that he had no authority to borrow or make such advance, that the company, defendant, may afterwards ratify said contract, either expressly or impliedly, by vote of the stockholders and directors, or by receiving the benefits of the money borrowed or advanced, made by said agent. If you find, from the evidence, that this is the case, the defendant is liable.

9. Because the jury erred in allowing the plaintiff twelve per cent. on his claim, contrary to the charge of the Court and contrary to the law.

10. Because the verdict is contrary to the evidence in the ca e, etc.

The Court refused a new trial and error is assigned on said grounds.

JOHN A. WIMPY, for plaintiff in error. Corporations must act within their charters: 2 Kent's Com., 299; 2 Cranch

R., 169; 13 Peter's R., 587; 2 Cowen's R., 675; 40 Ga. R. 619, 625. Mining companies have no implied authority to borrow money: 2 M. and N. R., 595; 2 Kent's Com., 298, (note.) They must act through their officers: A. and A. on Corp., sec. 231; 21 Howard's R., 365. How they appoint agents: A. and A. on Corp., sec., 283; 7 Cranch's R., 305. The treasurer could not bind the company: See Charter, Acts 1860, p. 132; 10th By-law; 7 Cranch's R., 305; 2 Barb. R., 107; 13 Peter's R., 287. Authority strictly construed: A. and A. on Corp., sec. 277. The province of directors: A. and A. on Corp., secs. 279, 280; 12 Wheat R., 113; 4 Mass. R., 596; 18 Ga., 411. If directors had authority to borrow money they could not delegate it to King: A. and A. on Corp., 277; 2 Kinnie's L. C., 492; 26 Wend. R., 485. General agents cannot run company in debt: 5 Denio's R., 283. A Georgia corporation cannot act in Massachucetts: A. and A. on Corp., sec. 1024; 27 Maine R., 507; 13 Peter's R., 288; 1 Black's, 286; 14 Ga. R., 341. Highest evidence must be produced: R. Code, sec. 3707; 12 Wheat R., 114, 115. Receipts of third persons are not admissible: 1 Gr. on Ev., secs. 212, 305.

GEORGE D. RICE; H. P. BELL, for defendant.

McCAY, Judge.

1. We recognize fully the doctrine that a corporation, as such, does not exist out of the jurisdiction which charters it: 1 Blatch. R., 628; 13 Pet. R., 588; 1 Black. U. S. R., 286. But, while this is true, nothing is now better settled than that a corporation may, by its agents, make contracts, sue and be sued, out of that jurisdiction which gave it birth. This State is full of agents, doing business for corporations of other States, and even for corporations of foreign States; and the authorities are now uniform that an agent of a corporation may exercise its powers out of the State incorporating it, provided there be nothing in the charter or in the

nature of its powers contravening it: 13 Pet. R., 588; 34 N. Y. R., 208. If one agent may thus act, there would seem to be no sensible reason why a board of agents may not do so. As the directors are only agents, the principle is broad enough to include them: See 35 Missouri R. 26; 27 Maine R. 509. The evidence is conclusive, that this corpotion was chartered by this State, and that it went into operation under the charter. Indeed, the fact that the president of the company appears and pleads to this declaration, admits the organization. Admitting that a stockholders' meeting could not be held out of the State, we must presume that the directors were chosen according to law, to-wit, in this State. The evidence is that several of them have been acting since 1861, and there is nothing in any of the pleas, or the evidence, showing (nor was it insisted on before the Court below) that the *directors* were not legally chosen We hold, therefore, that the records of the company, showing the *acts* of the directors, was good evidence to bind the company.

2. It is not necessary that the charter of a company should specify the powers granted to it, except so far as to specify the purposes of the company, and to *define* its franchises. Unless restrained by the charter, the grant of corporate powers carries with it the powers necessary to carry the franchise into effect. The power to contract — to incur debts, etc. — would seem to be incident to every corporation, unless the charter provides to the contrary: 5 Barbour R., 9; 25 Indiana R., 536; 1 Barb. R., 584. It would be impossible for this company to use its franchise without making contracts; and, without doubt, it may make any contract within the scope of the object of the franchise.

3. The general rule is, that the directors of a corporation may do any act within the powers of the company, unless restrained by the by-laws, or by the special votes of the stockholders, at their meetings: Angel & Ames on Cor., section 231; and there is nothing in any of the by-laws,

offered in evidence, to limit the power of the directors. We are, therefore, of the opinion that the directors might lawfully authorize the treasurer to borrow money and to contract debts for the purposes of the charter.

4. But we are of the opinion that if a corporation accept the services of another, and actually receive and use monies advanced by him, it cannot set up want of authority in its charter to make the contract. It would be outrageously unjust to permit a corporation to thus practice a fraud upon one dealing with it. If a corporation undertake to exercise a franchise not granted by its charter, there is strong authority for holding the act void and permitting even the corporation to repudiate it. Since, as it is said, the *act* is *illegal*, contrary to public policy. But where the objection is not that the corporation has undertaken to exercise a franchise not granted to it, but that its officers or agents have exceeded, not the powers of the corporation, but their own powers as agents, a different rule obtains. In such cases they stand like other principals employing agents, and if they knowingly receive the fruits of the excessive exercise of authority by their agents, they are held to have ratified the act. The proof here is abundant that Mr. King advanced the money and gave his services under his undertaking with and by the consent of the directors, and the proof is equally strong that the company has received and used both his services and his money.

5. We see no illegality in allowing the credit to Mr. King of the extra interest he had to pay to raise the money. He was actiug under the orders and by the consent of the directors, and the facts of the case show that this extra interest is not a charge for the use of Mr. King's money, but a mere return to him of money paid out by him for the use of the company. This account was audited by a committee, these items recognized, and we see no reason to disturb the account stated and agreed upon by both parties.

6. Without doubt there is a conflict in the evidence, and we are not prepared to say that the evidence does not pre-

ponderate somewhat in favor of the company, on at least two of the issues made in this case, to-wit: whether the $1,500 was an advance by way of loan, or whether it was in part payment of stock, to be taken by Mr. King; and, second, whether Mr. King did not specifically damage the company by failing to put the stock upon the market. But as there was evidence on both sides upon these issues, we are not disposed to disturb the verdict, sustained as it is by the refusal of the Judge who tried the case to grant a new trial. We think the jury might well have felt themselves justified in considering the report of the auditing committee as settling these questions in favor of Mr. King, and the evidence of the present president of the company is an admission of the truth of Mr. King's claim as it stands.

We do not, therefore, think this is such a case as demands our interference. It requires a very strong case to justify this Court to overturn the verdict of a jury with the judgment of the Court sustaining, in a question of evidence.

Judgment affirmed.

JOHN R. HOLSENBAKE, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

BY TWO JUDGES.—1. Where, on a trial for murder, it was proposed to prove certain statements of the prisoner confessing his guilt, made in jail to a fellow prisoner, and, on a preliminary examination, it appeared that the prisoner had, before these statements were made, written a letter to the Governor, indicating that the murder had been committed in pursuance of a conspiricy, and mentioning several names of persons as conspiritors, and the Attorney General of the State, by authority of the Governor, had offered him a full pardon if he would disclose the whole, but it did not appear that he had made any disclosure, either to the Attorney General or Governor, but had promised to do so in writing, which written disclosure he had not made at the time he made the statements to his fellow prisoner:

Held, That it was not error in the court to permit the statement thus

made to go to the jury, it not appearing that they were made under any undue influence at the time, and there being nothing to show that the arrangement with the Attorney General had been acted on by the prisoner.

2. The preliminary examination before the Court, to ascertain if confessions offered are, or are not voluntary, is properly conducted in the presence of the jury, and the confessions, when introduced, are to be passed upon by the jury, in all respects; the decision of the Judge that they were voluntarily made being only *prima facie*.

3. It is competent for the State to introduce evidence to contradict any facts stated by the prisoner in his statement made before the jury, under the Act of 1869.

4. A charge of the Court, that the jury must be *satisfied* that the defendant was insane before they can acquit him upon that ground, though, perhaps, too strongly stated, is not a ground for a new trial if there be no evidence of insanity before the jury.

5. When, on a trial for murder, the confessions of the prisoner were in evidence before the jury, and the Judge, in his charge, told the jury that whilst they could not convict upon the confessions alone, uncorroborated by other evidence, yet, that, if it was proven that the person to whom the confession referred, was unlawfully killed, this was evidence of corroboration sufficient to authorize the jury, under the law, to convict on the confessions:

Held, That this was not error.

6. If the verdict is amply sustained by the evidence, and no material error appears in the rulings of the court below, a new trial will not be granted. (R.) 28th February, 1872.

Criminal law. Before Judge CLARK. Macon Superior Court. May, 1871.

Holsenbake was indicted for murdering George W. Fish, in said county, on the 28th of February, 1871, by shooting him. He was tried in May, 1871.

Jacob Odom, a negro, testified that he was at the train about 2 o'clock, A. M., of said day, when Fish came on it to his home, Oglethorpe; that he took Fish's papers to carry for him, and, as they were walking near the Court-house door, some one shot a gun from it, and Fish fell. He added that he ran off for help, told several persons that Fish was killed, and begged them to go to see him. They

went, and found him dying from the effects of bullets in his head and neck.

What Odom said and did, as aforesaid after the shooting, was objected to by prisoner's counsel, but the objection was overruled. The parties whom Odom called up testified that Fish died in a few minutes from the effects of said wounds.

One McNeil testified that, in January, 1871, he was talking with Holsenbake, and that Holsenbake said that, if Fish was having improper intimacy with his (Holsenbake's) former wife, it would do Fish no good. Further he testified as follows: On the 10th of April, 1871, at night, he and the deputy sheriff happened to be near the jail together. Holsenbake and Loyd (who was indicted with him as accessory,) were in the jail up-stairs, in different rooms, and one Stubbs was in jail below Holsenbake. He heard Stubbs ask Holsenbake if Loyd were not the instigator of that matter, and Holsenbake said Loyd was, and charged Stubbs to tell no one of it. He did not suppose Holsenbake was aware that he (O'Neil) was there. Though he remained there about an hour, he did not remember any more of said conversation.

It was agreed that defendant's counsel might move to rule out this evidence, after they had examined the facts and circumstances under which Holsenbake so spoke to Stubbs.

Another witness testified that, two or three weeks before Fish's death, prisoner took a drink at a well; said it would be the last he would ever take there, and that something would soon happen which would not be agreeable news to the Jones family. (Jones was the father of Mrs. Holsenbake, and she and her child resided with Jones.) Another negro testified that Holsenbake several times consulted him as a fortune-teller; and, about two weeks before the killing, asked him if Fish was in the way of his reconciliation with his wife, and whether he (Holsenbake) would ever kill anybody. Stubbs was examined, and testified to a general conversation between himself and Holsenbake, in the eve-

ning before Loyd was put in jail, in which Holsenbake told him that he (Stubbs) was in no danger, for he knew nothing about the killing, but that he (Holsenbake) was in danger of being hung, for parties would swear lies against him; that he staid all night that night at Loyd's, but did not know whether Loyd and his wife knew it or not; that he was looking for Colonel Farrow to come down, and wished Stubbs, if Farrow asked him who killed Fish, to say he did not know; that he (Holsenbake) would bring some things to light before Court which would relieve Stubbs, but could not yet. This appearing to be substantially all that occurred between Stubbs and Holsenbake prior to said conversation heard by McNeil, McNeil's testimony was held competent over the objections of defendant's counsel. Prisoner's counsel reserved the right to move to rule out Stubb's testimony, when it should appear why Holsenbake so addressed him.

Colonel Farrow, Attorney General, was introduced. He produced a letter from Holsenbake, not dated, addressed to the civil authorities of Georgia, and turned over to Farrow by the Governor, on the 25th of April, 1872, with instructions to proceed to Oglethorpe, and try to find out whether there was a conspiracy to kill Fish, and who was concerned in it. This letter was introduced as evidence over prisoner's objection. It stated nothing to the purpose, but that prior to Fish's death, Jones, son of Jones, who had been elected to the State Senate as a radical, was discussing the probability of his father being unseated, and said, if he were, Bullock would appoint him District Judge; that when Holsenbake suggested that Fish would likely be appointed, he replied that his father could hire a negro to kill Fish, and it would be charged to some democratic Ku-klux, and his father would get the place at last. (Fish had been appointed District Judge before he was killed.)

Farrow testified that, with this letter, he saw Holsenbake and asked him to explain it, and told him, in presence of

Mr. Wallace, his attorney, that he (Farrow) would not give a cent for any confession of his own guilt, but, if he would disclose who else was engaged in it, he would recommend the Governor to pardon him, and he believed the Governor would regard his recommendation favorably. The record does not show when this was, nor that it was prior to the statement made to Stubbs. Farrow also said that it was arranged, on the day he spoke with H., in Wallace's presence, that Holsenbake should make a written statement. Holsenbake made a written statement, at Farrow's request, but what that was does not appear. Mr. Wallace testified to the remarks of Farrow to Holsenbake about as Farrow did. And Wallace offered to read a letter from Holensbake, written to him on the 20th of April, 1871, and his reply of the 26th, in which reply he stated that he had no doubt Farrow would keep his promise, and urged him, meanwhile, to get ready for trial, especially to get ready to prove that he anticipated living with his wife again, and that Fish's designs upon his wife were bad. This evidence was all offered to show that the confessions were made under the influence of hope of relief. The Court rejected Holsenbake's letter to Wallace, and Wallace's reply.

Stubbs was again introduced by the State over prisoner's objection. He then testified that since the conversation formerly detailed, Holsenbake told him that he, Holsenbake, killed Fish because of his, Holsenbake's wife, and that Loyd instigated him to do it. He admitted that detectives sent from Atlanta had promised him, Stubbs, a pardon if he would tell all he knew about the matter. Another witness testified to hearing this last conversation.

Here the State rested its case. Prisoner's counsel said they would introduce no evidence, but would read prisoner's statement. The Solicitor General asked if the reading of that statement would deprive defendant's counsel of the concluding argument. The Court said it would not, but that the State might rebut the statement by evidence. Prisoner's

counsel then read a written statement by prisoner. In it he said nothing about killing Fish. He stated in it that during his long absence of four or five years from his wife, she frequently wrote him to return and live with her; that, after his return, he watched Fish going to her room, (as he supposed,) giving this in detail; stated that this made him almost a maniac, and under this influence he might have made improper threats against Fish; that any confessions made were in hope of Executive pardon.

The State introduced a record showing that Holsenbake's wife had been divorced from him, but when the divorce was granted does not appear. Several witnesses testified to Mrs. Holsenbake's chaste and ladylike conduct. While one of them was being examined, defendant's counsel, on cross-examination, asked him what was Fish's character for libertinism. This was objected to. The Court said the question might be asked, but if prisoner cross-examined the witness they would lose the conclusion of the argument. Upon reconsideration the Court said he would not allow the question answered, but would withhold any decision as to the effect of cross-examination of the State's witness upon the right to open and conclude the argument until the point arose. The prisoner's counsel did not cross-examine the witness. Mrs. Holsenbake testified that Fish never had been in her company except in the presence of other persons. Here the evidence was closed. Defendant's counsel opened and concluded the argument.

The Court charged the jury as follows, reading the sections of the Code cited therein defining murder, etc:

GENTLEMEN: You are called to the discharge of a most solemn duty; one that no good citizen should seek, but one that all good citizens who have at heart the well-being of society, and the faithful maintenance of the law, should discharge with faithfulness and fidelity, so as to vindicate the law, acquit their consciences, and measure out justice to those accused of crime.

The defendant is charged, before the bar of the county, with the high crime of murder. If he is guilty of the charge, he has forfeited his life. The law makes that the penalty of the transgression; it lays its powerful and strong hand upon him, and calls upon him in a most solemn form to answer the charge; it gives him every advantage of counsel, and the privilege of selecting the men as jurors who shall pass upon his guilt or innocence.

This grave responsibility is cast upon you, and you alone can discharge it. If he is guilty, you will, without regard to consequences, go forward and meet the result like honest men. If he is innocent, you will, with equal firmness, throw the protection of the law around him by a verdict of not guilty.

The wisdom of the world has demonstrated that society cannot protect itself against the crime of murder, otherwise than by taking the life of the offender. No other punishment seems adequate to the enormity of the crime, and it is only in those countries where this penalty is promptly inflicted upon the guilty, that human life is protected. It is the certainty of the punishment that deters offenders. That mistaken or misapplied clemency which shields the offender and protects the guilty—which shrinks back from the consequence of verdicts of guilty—inflicts a fatal blow at the best interest of society, gives license to crime, and leaves the peaceable and unprotected citizen at the mercy of every desperado who may seek his life.

Still, in the maintenance of the law and the protection of the community, the vindication of the innocent is a duty as sacred and binding as the punishment of the guilty. While you should set your face against crime, and sternly and unflinchingly bring the criminal to justice, you should stretch forth your hand to save the innocent from harm.

The great questions for your deliberate consideration are these:

1. Did the deceased, George W. Fish, come to his death in the manner set forth in the bill of indictment?

2. Was the crime committed in this county?

3. Did the defendant, Holsenbake, commit the crime?

Murder, Code, sections 4254, 4255, 4256. Malice is the main ingredient of murder. In every killing the law presumes malice, and if the accused is identified as the slayer, it is incumbent on him to show there was no malice: 3739.

Code, section ... Confessions of guilt should be received with great caution. But when the proper caution has been observed in the reception of the testimony, if it appears that the confessions were deliberately made, that they were made freely and voluntary, without being induced by another, by the slightest hope of benefit, or remotest fear of injury, they are the most effectual proofs in the law; their value depends on the supposition that they are deliberate and voluntary, and on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience. A confession alone, uncorroborated by other evidence, will not justify a conviction: section 3739.

The question for your consideration is, what "other evidence" is corroborative?

The corroboration contemplated by law, in this case, is that of the death of Fish, and that he came to his death by gunshot wounds. This is what is called in law the "*corpus delicti.*" These facts must be made out before you can convict upon the confessions of defendant, however deliberately made. The reason of this wise rule is, that persons have been convicted and executed upon their confessions, and afterwards the supposed dead man was found alive.

You must be fully satisfied that Colonel Fish was killed, that he was killed unlawfully, while in the peace of State, before you can convict upon the confessions alone of the defendant; but if you are satisfied of these facts, no other corroboration is necessary. That is the only other evidence

needed, in order to justify you in finding a verdict of guilty upon the confessions, provided you are satisfied that the defendant has confessed that he committed the crime.

If Mr. and Mrs. Holsenbake were divorced from each other by a decree of the Superior Court of Macon county, the relations of man and wife ceased from the date of the decree, and they were, from that time, no longer responsible for the conduct of each other. Holsenbake ceased, from that time, to have any control over the action or conduct of Mrs. Holsenbake. He was not responsible for her support or maintenance, nor was he responsible, either legally or morally, for any act of hers. It was no concern of his, more than any other man in the county, whether or not she went astray from the path of rectitude. If she had been polluted with shame and disgrace, it is her misfortune; but his hand could not shield her, nor could his arm inflict punishment on the suspected man. He had no right to take the life of Colonel Fish—if he did take it—on account of suspicion, in his mind, of too great intimacy with Mrs. Holsenbake. He had no right to take his life if he had caught him in the act of adultery; and if he had taken his life under such circumstances, it would have been murder. If he could not take life for actual adultery, much less could he take life—if he did take it—upon a suspicion of guilt.

The marriage bed is sacred, and when it has been invaded, society may wink at a swift and terrible retribution upon the offenders, but the martial rights can only attach when the state of marriage exists, and in no case when the parties have been divorced. Society, in its regard for the sacredness of the marriage relations, can go no further than this without breaking down all barriers, and putting itself and the lives of its citizens at the mercy of every jealous-minded and evil-disposed man.

Insanity. The killing must have been done by a person of sound memory and discretion. A lunatic or idiot, or one who is inflicted with insanity, is not responsible for his acts.

He is capable of doing a deed, but is incapable of committing crime—except the offense is committed in a lucid interval—the man who so takes life is not responsible to the law.

The law presumes every man to be of sound mind, and responsible for his acts, and that presumption continues until the contrary is shown. If the defendant relies upon insanity to excuse or justify the killing of deceased, he must prove it; it is not a matter of speculation or conjecture, but a matter of proof, like any other fact; and, if the defendant makes the issue, he must prove it to your satisfaction, or you will be bound to discredit it.

If Holsenbake committed the crime charged against him, and if at the time of its committal he had capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act in question; if he had knowledge and consciousnes that the act was wrong, and would deserve punishment, he is responsible for the deed. Upon this question it is for you to look into the testimony, and if the deed was committed in secret, at the dark hour of night, from a place of concealment, with any arrangement and purpose to avoid detection, to say how far an insane mind would have thus deliberated and planned the death of another.

Statement of Prisoner. The prisoner is allowed, under the law, to make his statements to the jury, not under oath, and you can attach such importance to them as you think proper. You can receive them as true in the whole or in part, or you can reject them from your consideration entirely. You should construe any statement thus deliberately made, which may imply guilt, if such exist, most strongly against the defendant.

Doubts. If, after a full and impartial consideration of all the facts in the case, there is a reasonable doubt in your mind as to the guilt of defendant, you will render a verdict of not guilty. Such doubts must not be mere speculations or idle conjectures, but well-founded doubts, growing out of the evidence alone—such doubts as prevent your mind from reach-

ing a safe and satisfactory conclusion. But if, upon a full consideration of the facts, you do, as reasonable men, conclude that the crime was committed, and that defendant committed the crime, you can safely go forward, and you should do so, and find a verdict of guilty. But if, after due deliberation, you cannot come at a satisfactory conclusion, but the mind is still in doubt as to the guilt of defendant, you will find him not guilty.

The jury found Holsenbake guilty. Defendant's counsel moved for a new trial, upon the following grounds: The Court erred —

1. In admitting the testimony of the witness, Jacob Odom.

2. In admitting the evidence of McNeil as to confessions.

3. In admitting the evidence of Stubbs as to confessions, and in excluding the letter of Wallace.

4. In admitting, in evidence, the letter of prisoner to Governor Bullock.

5. In allowing the State to reopen the case, and introduce new evidence in rebuttal of prisoner's statement.

6. In admitting evidence to the jury of the good character of Mrs. Holsenbake, in rebuttal of said statement.

7. In its original ruling as to the effect of the cross-examination of the State's witnesses, in depriving prisoner's counsel of the concluding argument to the jury, and in the subsequent withdrawal of that decision, and refusal to say whether the Court would reaffirm said decision or not.

8. In refusing to permit prisoner to prove the character of Fish for lechery and libertinism, as above explained and set forth, after allowing the State to show Mrs. Holsenbake's good character.

9. In the charge to the jury—above set forth—the same being, in whole and in part, contrary to law.

10. Because the verdict is strongly and decidedly against the weight of the evidence, unsupported by evidence, etc.

The Court refused a new trial, and error is assigned on said grounds.

C. T. GOODE; W. S. WALLACE; JACK BROWN; W. H. REESE, for plaintiff in error.

W. A. HAWKINS, Solicitor General, *pro tem.*; PHIL. COOK, for the State, cited 21 Ga. R., 227; 28th, 92, 576; Roscoe's Crim. Ev., 55; 2 Bailey's R., 569; 4 C. & P., 221; 14 Ga. R., 43; Brasell *vs.* State, and Banks *vs.* State, May, 1871.

McCAY, Judge.

1. It is very possible that the truth of this case does not appear in the record, and that it was not brought out on the trial. As the case is presented to us, we are unable to find any fault with the Judge for admitting the statements of the prisoner. It does not appear that he made any confession to Mr. Farrow. All that appears is that he promised to do so. It would be pushing the caution and charity of the law very far to refuse the statements made at the jail, under this state of the case. We recognize the rule, that, if a confession be drawn out by improper influences, statements respecting it, though made to persons in no way connected with the first statement, will not be received, until it be shown that the accused was entirely free from the improper influences. We are not prepared to say that a confession, made to Mr. Farrow, would have or would have not been admissible. We have no means of knowing whether Mr. Farrow's promises acted on his mind; simply because, so far as the record shows, he made no confession to him. Nor is there anything in the proof going to show that what came out at the jail was in the least influenced by Mr. Farrow's promises. Indeed, what occurred at the jail seems, affirmatively, to have come out in violation of his pledge to Mr. Farrow, since that confession was to be in writing.

2. We see no error in the action of the Court in making the preliminary examination before the jury. The truth is,

it is only before the jury it can be made. It would be a wrong to the prisoner to make it in any other way. The decision of the Judge that confessions are admissible is only *prima facie*, by the Judge. If he admits them, it is still his duty to instruct the jury that, if they were not freely made they should reject them as evidence; and, in any event, the jury will consider the circumstances under which they were made, in determining their weight. It is no reply to this to say that, by this course, the jury will ordinarily hear the confessions, and that they will necessarily affect their minds. This is quite an uncomplimentary argument, as respects the jury, and we do not consider it of much weight. It would be impossible to conduct a jury trial on this principle. In most cases it is impossible for the Judge to determine the admissibility of evidence until he knows what the evidence is. Experience has proven that juries will not give any weight to evidence which the Judge tells them is not before them. At any rate, this, if it be an evil, is an evil inevitable, in jury trials.

3. The Statute Code, section ....., makes the statement of the prisoner evidence for what it is worth. We see no reason why statements thus made should not be contradicted as well as other statements he may make. It is always good evidence to show that a prisoner has made untrue or contradictory statements concerning the matter of which he is accused.

4. *Prima facie*, all persons are to be considered sane, and this is true in criminal as well as civil trials. If this be the legal presumption, it would seem to follow that unless the jury are satisfied of insanity, they must consider the prisoner sane. Perhaps the word *satisfied* is rather strong, and were there any evidence here of insanity, we might hesitate to sustain the Judge. But there seems to have been no such evidence. The rambling statement of the prisoner is, it is true, very incoherent, but it would be rather dangerous to give much weight to an evidence of insanity so liable to imposition as this. The wickedness of the crime and the want of

apparent motive, would be equally dangerous. Motives are generally hard to discover, and wickedness is unfortunately incident to human nature, even in sane people. We are free to say that we are not disposed to look kindly on pleas of insanity that have their strongest evidence in the enormity of the crime, and that are not thought of until it becomes important to excuse a violator of the law. So far as appears from the record in this case, there was no other evidence of insanity but the enormity of the crime and the incoherence of the prisoner's statement to the jury, and, even if we were satisfied that the charge of the Judge, to the effect that they must be satisfied of the insanity of the prisoner before they could find him not guilty, on that ground, we would not grant a new trial, simply because there was here no evidence of insanity.

5. Our Code provides that "a confession alone, uncorroborated by other evidence, will not justify a conviction." It is contended that, by this clause of the Code, it is necessary there shall be corroboration of the confession in that part of it which acknowledges that the prisoner committed the crime. To make out any case of guilt, there are two essential ingredients: First, a crime, must be committed, and the person charged must be the party who committed it. One of these elements is just as essential as the other. If one confesses that he has committed a crime, that is not sufficient to convict. But if it be proven that just such a crime as he acknowledges was, in fact, committed, does not this corroborate his confession? The Code does not fix the amount of corroboration. It does not say that it shall be corroborated in a number of particulars, but simply that a confession alone, uncorroborated by other evidence, shall not be sufficient. To require a confession to be corroborated in *every* particular, would be to say that a confession is not sufficient, unless there be other evidence, sufficient without the confession, which would be absurd. We do not feel authorized to draw any line. The confession must be corroborated,

but how far, and in what particulars, is not said. That there has been an *unlawful* killing, is, in a case of a charge of murder, one particular, and an important one. Each case must stand on its own footing, the jury being the judges. And if they convict on a confession which is corroborated by only one circumstance, the rule is complied with; the strength of that circumstance is to be judged of by the jury, according to the case. In the case before us, the confession is, in fact, corroborated in several particulars. The prisoner admits enmity to the deceased; the killing was with the weapons mentioned; it was an assassination, as mentioned, etc.

6. We think the verdict in this case amply sustained by the evidence; and believing, as we do, that there was no material error in the rulings of the Court, we affirm the judgment.

JAMES C. LOYD, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

(BY TWO JUDGES).—1. The principal felon and an accessory before the fact may be jointly indicted in the same indictment with proper averments and charges against each.

2. The form of an indictment, as prescribed by section 4535 of the Revised Code, need not be followed to the letter; it is sufficient if it be conformed to in all material particulars.

3. On the calling of an indictment against a principal and accessory, the Court may require both to answer ready or not ready for trial; if they answer, and the principal be put on trial, it is not error to put the accessory on his trial at the same term of the Court after the conviction of the principal, without any new requirement to announce, unless it appear that some cause for a continuance has happened since the first calling of the case.

4. It is no ground for a new trial that the Court refused to continue, because of the absence of one of the prisoner's counsel, on whom he principally relied, from sickness, the affidavit for continuance only saying that the affiant "had been informed by letter of the sickness;"

especially if it appear that other competent counsel are employed and do appear in the trial.

5. It is not a good ground, for the continuance of the case against an accessory before the fact, to show that the principal felon has been convicted, yet that he intends moving for a new trial.
6. It is no ground of challenge against a juryman that he has formed and expressed an opinion, etc., upon one of the facts necessary to make out the charge against the prisoner, and it is not error in the Court to say, in the presence of the panel, that the formation and expression of an opinion as to the guilt or innocence of the principal in a crime, does not, of itself, render them incompetent to sit upon the trial of the accessory before the fact.
7. It is not a ground for a new trial in a criminal case, that the Judge admitted, as evidence before the jury, the written report of a phonographer of the prisoner's statement before the magistrates at the summary hearing previous to commitment, the report being sworn by the phonographer to be true, and the prisoner having full opportunity to examine him thereto before the jury; it further appearing that the statement was very immaterial, and that it took the prisoner four hours to make it.
8. When a prisoner undertakes to make a statement before the jury, and he indulges in long, rambling statements of matters wholly immaterial to the matter in hand, so as to consume several hours, and yet say nothing pertinent to the issue before the Court, it is no ground for new trial for the Court to admonish him that he must confine his statement to matters bearing on the case.
9. It is not error in the Court to charge the jury on the question of insanity, that if one have indulged his passions or blunted his moral sense, so that he can commit crime without remorse, and fails to see its heniousness, as persons of purer morals and more restrained passions see it, this does not make him insane. If he have sufficient capacity to discern right and wrong as to the particular act in question, if he has knowledge and consciousness that the act he is doing is wrong and would deserve punishment, he is of sound mind and memory, so as to be subject to punishment.
10. The verdict, in this case, is not contrary to the evidence nor contrary to law.
11. When, in a murder case, counsel for plaintiff in error arrived late, because he was sick, and it was then discovered that the brief of evidence had not been sent up. time was given to procure it; and, by consent, it was made part of the record, and the case proceeded. (R.) See end of report. 27th February, 1872.

Criminal Law and Pleading. Before Judge CLARK. Macon Superior Court. May Term, 1871.

In the same bill of indictment, John R. Holsenbake was indicted for murdering George W. Fish, and James C. Loyd, was indicted for being accessory before the fact. The first count was against Holsenbake, as principal perpetrator, and began and concluded in the forms required by section 4536 of the Revised Code. But the second count, which charged Loyd, while it concluded with "contrary to the laws of said State," etc., as is required by said section, *began* simply, "and that James C. Loyd, etc., omitting the form prescribed in said section: "And the jurors aforesaid, in the name and behalf of the citizens of Georgia," etc. When the cause was called, defendants said they would sever, and the Solicitor General stated that he would put Holsenbake on trial first. He announced ready. The Court asked if Loyd was also ready. His counsel objected to his announcing till Holsenbake was tried. The objection was overruled. Loyd moved for a continuance upon the ground of the absence of Culverhouse, one of his attorneys, making affidavit that Culverhouse was one of his original counsel and an old acquaintance and friend of Loyd, and, therefore, he principally relied on Culverhouse, and that he "was informed by letter that Culverhouse's wife was dangerously ill, and too ill for his attendance on Court." The defendant being represented by other counsel, the motion to continue was overruled. Loyd demurred to the indictment because the count against him did not begin and conclude in the form required by law, and because he and Holsenbake were *jointly* indicted, one as principal and the other as accessory. This demurrer was overruled. Loyd was then sent back to jail, and Holsenbake was tried and convicted. Loyd was then brought out for trial. His counsel moved again to continue because Holsenbake's counsel were preparing a brief of evidence and bill of exceptions in Holsenbake's case, and had filed Holsenbake's pauper affidavit to supersede the judgment against him. The Court refused to continue the cause.

The panel of jurors who tried Holsenbake were discharged. But during his trial many persons were in the Court-room, and heard the evidence in Holsenbake's case. When the first juror was put upon Loyd, the Court instructed him and the other persons of the panel, that the formation and expression of an opinion as to Holsenbake's guilt or innocence did not disqualify them to try Loyd; that they were not disqualified in this case unless, from seeing the crime committed, or having heard part of the evidence delivered on oath, they had formed and expressed an opinion as to the guilt or innocence of Loyd. These instructions were protested against by Loyd's counsel. The jury was impanneled, Loyd's peremptory challenges not having been exhausted. The State introduced the record of Holsenbake's conviction over defendant's objection. The State showed that Fish was killed when, where and in the manner charged, and that certain paper gun-wads were found near his person. One Rasberry testified that Loyd showed him the room in which Holsenbake slept on the night of the killing, and that he found there gun-wads like those found near Fish's body. He further testified that, as a detective, he was concealed in the jail, and overheard a conversation between Holsenbake and Loyd; that Holsenbake asked Loyd if he believed Fish had improper intimacy with his, Holsenbake's, wife, and Loyd stated various things inducing him to that belief, and said he did so believe; that Loyd said Fish had caused his, Loyd's, dismissal from the the post-office; that Holsenbake said, "no one knows of this but us," and Loyd replied that he did not know whether that was true; Holsenbake said if he had loaded the gun with paper instead of those wads there had been no clue to the slayer; when Loyd said he did not see how the wads could furnish a clue, as he had given such wads to many persons, some to negroes. Holsenbake asked Loyd if he did not think his first plan would have been better, and if it would not have been best to kill Mrs. Holsenbake's father first, and Loyd replied "yes, for I thought her father was at the bottom of

the whole difficulty;" Holsenbake asked Loyd if he did not think it would have been better to have done it at the church, Loyd evaded the question, and whispered, saying he thought he heard some one eavesdropping. They talked again; again referred to the wads, and Loyd also mentioned about Fish's having fenced up a road, but stated that he did not have anything against him for that. He asked Holsenbake whether he used his big pistol or his shot-gun, and Holsenbake said he used his gun. Witness said he had no interest in convicting Loyd, he had been a policeman in Atlanta, and had received $100 from the Ordinary of said county as a token of his services, and $215 to pay his expenses from Atlanta. Murphy, another detective, who was also hid with him in jail when said conversation occurred, said he did not hear all the conversation because sometimes they whispered. Because he did not hear all, the defendant's counsel moved to rule out that part which he did hear, but the Court refused to do so.

The gun and wads were introduced. The State then read in evidence a copy of Loyd's statement made on the committing trial, which copy the phonographer swore he wrote in short-hand when the statement was made, and afterwards copied correctly. This was put in over defendant's objection. It appeared that it took Loyd three hours to make it. It was a review of Loyd's conduct as Postmaster, Revenue Collector and Registrar, and many things wholly impertinent to the issue. But in it was stated that Holsenbake was, for sometime before the killing, staying at Loyd's house, was very much exercised because his wife had been divorced from him, and blamed Fish for supposed intimacy with her, and threatened to kill Fish and her father; and that Loyd, supposing Holsenbake would do no such thing, jocosely said "yes, kill them all;" but that when he talked seriously, he told Holsenbake that such conduct was horribly wicked, etc. He admitted that Holsenbake got the wads from him, but it appeared

that Loyd was a great hunter and had several guns and much ammunition in his house.

Another witness testified that, after the killing, he applied to Loyd to buy a shot-gun, when Loyd said that witness did not want to buy any gun, but simply to examine or measure his guns, and would not sell one. Another testified that Loyd said he heard his dogs bark furiously just after the shooting, and heard Holsenbake coughing, but that while Holsenbake might have done it, he did not see how he could have been the slayer. There was also evidence that Loyd had said that if five or ten men would join him he would tear down said fence which Fish had built.

The defendant introduced various witnesses to prove that Holsenbake was insane. They stated how he behaved, hanging about the house of his divorced wife, etc., but all stated that they believed that he knew it was wrong to kill any one. Loyd's wife was offered as a witness, but the Court held her to be incompetent.

In rebuttal, Mrs. Holsenbake testified that she had given Holsenbake no reason to suppose she would ever remarry him, but had repulsed him, and explained what little written communications had been had between them since the divorce. The record of the divorce was introduced. The State closed.

Loyd then made a statement which occupied over four hours. It is substantially the same as the other. Whilst he was making it the Court said, "I cannot indulge you in this line of remark. You have stated, perhaps, a thousand things that can have no connection with the merits of the case. You are free to state any and every fact having the least relevancy to the case, and having a bearing on your guilt or innocence, and are invited to do so; but you must condense your thoughts, and bring your mind to bear upon things material and necessary to be said, to show that you are not guilty, or that Holsenbake is not guilty, and not ramble off upon immaterial subjects. You have spent four hours in your statement which

could have been rendered in a shorter time." The Court charged the jury as follows, reading to the jury the sections of the Code therein marked, defining the crime, etc.:

It is the duty of the State to make out, by proof, to your satisfaction—1. That George W. Fish was murdered by some one in this county. 2. That John R. Holsenbake was the actual perpetrator of the crime, or the person who killed Fish, and that Holsenbake has been guilty of the crime. 3. That Loyd, the defendant, though absent at the time of the killing of Fish, did procure, counsel or command Holsenbake to commit the crime. Murder: Code sections 4254, 4255, 4256, read. Accessory: Code sections 4241, 4242, read.

If the State has shown to your satisfaction that Fish was murdered, that the crime was committed by Holsenbake, that Holsenbake has been covicted by the verdict of a jury, that Loyd was absent at the time of the killing, but that, though absent, he did counsel or procure Holsenbake to kill Fish, then it will be your duty to find Loyd guilty, unless he has shown you that he is not guilty.

The bill of indictment and the verdict of the jury of guilty as to Holsenbake, in the case of The State *vs.* Holsenbake, as principal, and Loyd as accessory before the fact, is proof conclusive of the fact that Holsenbake is regularly convicted of the crime of murder. The defendant, Loyd, cannot deny this fact.

Such a bill of indictment and verdict of guilty as to Holsenbake, is *prima facie* evidence or presumptive evidence of Holsenbake's guilt. This means that, upon such a bill of indictment and verdict of guilty being introduced, in evidence, by the State, it is not necessary for the State to introduce other evidence of Holsenbake's guilt, but in such a case the burden of showing that Holsenbake was not guilty is upon Loyd.

That bill of indictment and the verdict of the jury is only *prima facie* evidence of Holsenbake's guilt, it is no evidence of Loyd's guilt. The State must make out Loyd's guilt by

the usual modes—that is by such other proof as satisfies you that he is guilty.

The verdict of guilty is also *prima facie* or presumptive evidence that Holsenbake, at the time of the commission of the crime, was not a lunatic, but a person of sound memory and discretion, and capable in law of committing the crime; and if defendant seeks to set up the lunacy of Holsenbake, he must prove it.

The defendant sets up as a defense to this prosecution: 1. That he is not guilty, that if Holsenbake did kill Fish, he, Loyd, did not procure or counsel Holsenbake to commit the crime. If this defense is sustained, or the State has failed to show that Loyd did procure or counsel Holsenbake, then defendant is not guilty, and you should so find.

Defendant, Loyd, further sets up as a defense, that if Holsenbake did kill Fish, Holsenbake was a lunatic at the time, that he was not of sound memory and discretion, and that, if he was a lunatic, he could not be guilty of crime, and if such is the fact, he, Loyd, is not an accessory before the fact, but should have been indicted as the principal perpetrator of the crime, and not as accessory before the fact. He read Code, section 4223. If Holsenbake was a lunatic when he killed Fish, and Loyd caused him to kill him, Loyd should have been indicted as principal and not as accessory. And if such is the fact, you cannot find him guilty as accessory before the fact; and as he is not charged in the bill of indictment as principal, it will be your duty to acquit him by a verdict of not guilty, if you believe that Holsenbake was a lunatic at the time of the killing. But in such a case as this, if Loyd pleads the insanity of Holsenbake as a reason why he should not be convicted as an accessory before the fact, it is his duty to prove the fact to your satisfaction, so that you shall have no reasonable doubt in your mind as to Holsenbake's insanity. If Holsenbake were now on trial, and you had reasonable doubts as to his sanity or insanity at the time of the commission of the deed, you might possibly

give Holsenbake the benefit of the doubt and find him not guilty. But when Loyd pleads it he must remove all reasonable doubt from your minds. He must satisfy you, beyond all reasonable doubt, that Holsenbake was a lunatic. It may be possible for Holsenbake to have raised reasonable doubts in order to have demanded a verdict of not guilty; something more than this is required of Loyd. He must not merely raise doubts of the lunacy of Holsenbake, but he must go further and remove the doubts, and leave your minds without a reasonable doubt. He must clear the mist, and leave you reasonably certain in your minds that Holsenbake was insane. If he so far fails as to leave you in doubt whether Holsenbake was sane or insane, you will be compelled to disregard the plea. There are certain baser passions of our nature which require the constant restraint of a sound and well-balanced judgment to keep them within proper bounds. Unrestrained and uncontrolled they pervert the moral sense, degrade the intellect, and lead to the commission of those offenses and crimes which have, in all ages, demanded the interposition of the law, in order to protect society from their consequences.

Man owes no greater duty to himself than, by the constant use of checks and restraints, to so far subdue the passions as to bring them under the control of the reason and judgment. Whenever he fails to do this, and gives a loose rein to their indulgence, he loses the mastery over himself, at once degenerates to the lowest condition of vice and becomes a dangerous member of society.

These passions grow upon what they feed upon; and when constantly supplied with food from the suggestions of an evil and corrupt nature, they as certainly control us, debase our better nature, make us subject to their unruly behests, as effect follows cause, in the operations of nature; and man descends from his high estate of honor, of integrity and of virtue, to a condition more closely resembling, in his baser nature, the brute creation than the intelligent being whom a wise Creator has made in His own image,

and placed on the earth for wise purposes—purposes not inconsistent with the happiness of man and the glory of his Maker.

Envy is one of these passions. It exists, to a greater or less degree, in the breasts of all people, and when not properly controlled it not unfrequently becomes a consuming flame. It is condemned as a base passion by the good sense and intelligence of the race. Some people are peculiarly under the influence of it, so much as to unfit them from according merit where it belongs. Some men are supposed to be subject to it more than others, so much so at times as to warp the judgment, and impair the moral sense. While its indulgence is disreputable and even sinful, the law cannot interfere. It only interposes when crime results and the envious man has become so much of a slave to his passions as to become a criminal.

Ambition is a strong passion. When directed to good purposes and good ends, it is a prompt stimulant to exertion, and one of the great elements of success, in all the avocations of life. But when released from wholesome control, it soon overleaps all bounds of virtue and propriety. It hesitates at no obstacle in the way of success, but uses the good and bad alike for purposes of its own advancement. The world has been deluged with the blood of millions to promote the ambitious views of unscrupulous men. While the law frequently cannot reach these, its greatest violators, they are, nevertheless, amenable to the unprejudiced and sober verdict of mankind and the impartial Judge of all the earth for the enormity of their crimes and transgressions.

Hatred is another one of the bad passions that spring from the corruptions of the heart. It is condemned by that great moral law which Infinite Wisdom has prescribed for the conduct of man. To hate our neighbor is a crime and a vice against the moral law. But men will hate one another, and, in order to justify this basest of the passions of the heart, will concoct and carry out schemes of mischief that

result in death, and that bring sorrow and grief into innocent households.

Jealousy is another one of the passions. It cannot be said that a reasonably jealous care over the reputation of ourselves, or those who are connected to us by ties of blood or family relationship, is improper. But it degenerates into a vice when it so far masters the judgment as to become a controlling passion. Love is a fruitful source of jealousy; and the history of mankind affords numberless instances of men and women who have fallen victims to the unholy indulgence of this passion. It poisons the affections, contorts the judgment, creates unusual and unaccountable suspicions, and prepares the mind for the commission of any crime, however heninous in its character, or destructive in its results.

One of the great objects and purposes of law is to prevent men and deter them from the unbridled indulgence of these passions; and while it cannot destroy them, it can, by wholesome restraints and adequate punishment, force men to keep their passions within reasonable bounds, and under the control of a reasonable judgment, so that no harm can come to others from their indulgence.

We are invested with these passions, and they are permitted by the kind Author of our being for wise purposes; they have their proper place in the making up of our moral and intellectual constitution. The cultivation of the better parts of our nature, and the control of the evil and grosser passions, ennobles man, and prepares him for all the higher and nobler duties of life; while unchecked indulgence in the evil passions debases his nature, and prepares him for the commission of crime of all grades, and renders absolutely necessary the interposition of law, in order to protect society, and save it from the evil purposes of bad men. But the sinful indulgence of these passions, even until the mind has been poisoned, and the better judgment has been brought under complete control, so that the conscience is blunted,

and the moral senses have lost their acuteness, does not make the man a lunatic.

The thief who has stolen so often and so much as to lose all sense of degradation, and feels no compunction for the crime, is not a lunatic. The jealous man who permitted an evil passion to master him, and who, in consequence, dips his hand in the blood of his victim, is not a lunatic, merely because nothing else will satisfy him but the blood of his rival. The man who hates his neighbor, and who has suffered this evil passion to warp his nature and fire his brain, until he gets his consent to waylay and assassinate the object of his vengeance, is not a lunatic.

To allow for a moment such a plea as this upon the ground that the evil passions had controlled the better parts of man's nature, and that the free indulgence in them had broken down the restraints that every virtuous man uses to control himself, would at once precipitate upon the country the most deplorable results. The wicked man, who has been a prey all his life to evil passions and evil influences, would at once receive a license to practice upon the community the most henious crimes, and, when charged with them, screen himself behind the plea of lunacy. The consequence would be, that the whole country would be flooded with crime—murder, arson, burglary, adultery, and all the offenses known in the calendar of the worst countries, and among the lowest classes of our race. Every man who has his moral senses so far blunted as to allow him to commit crime is not a lunatic. This condition of want of moral sense and blunted perceptions is really the condition of every man who deliberately perpetrates a crime. He does not see the offense, and cannot see it in the same light and with the same disgust that one of more elevated and purer moral sentiments would see it. If, from any cause, the mind is so far diseased that it cannot discern between right and wrong, the perpetrator of a deed, while in such a condition, is a lunatic, and, as a luaatic, he is not responsible for the commission of crime. One who

is a lunatic cannot commit a crime. He is not in a state of mind to be responsible either to God or man for his conduct, while in such a state of mental alienation. Lunacy is a visitation of God; and when God's hand has thus been laid heavily upon the man, and He has drawn a veil over his intellect, so as to destroy the distinction between right and wrong, as to the deed about to be committed, the unfortunate man ceases to be a moral agent, and there is no power to punish him. Accountability to the law of God and man ceases when reason ceases. But if reason has its sway so far as to allow him to see and discern the right and wrong of the deed about to be done, and to know that it deserves punishment, he is accountable, both to the law of God and man, for the deed. The law, upon this subject, is fully and concisely stated by the Supreme Court, in these words: "If a man has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act in question, if he has knowledge and consciousness that the act he is doing is wrong, and would deserve punishment, he is of sound mind and memory, and subject to punishment." Apply this rule to the case now on trial, and determine this issue according to the facts.

DOUBTS. The doubts that are contemplated by the law are such doubts as are reasonable, and such as a reasonable man would entertain. They must spring up in the mind from the weakness or insufficiency of the evidence. Mere fanciful doubts, or conjectures that may capriciously float in the mind, are not reasonable doubts. They are nothing more than caprices of the intellect, not founded on reason or good sense. Some men believe very few things, and are of a doubting nature as to the character and truthfulness of testimony. Such men are not reasonable men, and their stubborn disbelief in the existence of facts, in spite of testimony, is unreasonable, and such as the law does not allow.

A reasonable man hesitates when the mind is in such a

state of uncertainty, after carefully examining all the evidence, that it cannot considerately go forward, and find a verdict of guilty. If, after mature consideration of all the facts developed on this trial, you are in this condition of doubt and uncertainty as to the guilt of defendant, you will find him not guilty; but, if you have no such doubts, and entertain a reasonable and satisfactory conviction that he is guilty, you will find him guilty.

The jury found Loyd guilty. His counsel told the Court that they would prepare a brief of evidence, and make a motion for new trial, and carry the case up, but that it would be upon the points taken on the trial, and they did not wish to argue the points. Thereupon the Court proceeded to sentence Loyd.

The motion for new trial was made upon the grounds that the Court had erred—1st. In overruling the demurrer to the indictment. 2d. In requiring Loyd to announce ready before Holsenbake was tried. 3d. In overruling his first motion to continue. 4th. In overruling his second motion to continue. 5th. In instructing the jury that the formation and expression of an opinion as to Holsenbake's guilt or innocence did not disqualify them for trying Loyd. 6th. In admitting said copy of Loyd's statement before the committing magistrate as evidence. 7th. By interrupting Loyd, as he did, when Loyd was making his statement to the jury. 8th. In charging as he did—without specifying what parts of the charge they claim to be erroneous. 9th. In not ruling out Murphy's statement of a conversation, of which he heard but part, and because the verdict was contrary to law, etc., founded upon confessions alone, etc. The Court refused a new trial, and error is assigned on said grounds.

Downs, being sick, arrived late. It then appeared that no brief of the evidence had been sent up. The Court, by consent, passed the case over Saturday till Tuesday, to allow the evidence to be obtained. It was given, and, by consent, the record was amended by adding the evidence.

C. T. GOODE; W. S. WALLACE; JACK BROWN; W. H. REESE, for plaintiff in error.

W. A. HAWKINS, Solicitor General, *pro tem.;* PHIL. COOK, for the State. Accessory may be made to plead first: 1 Ch. Pl., 421; 2 Hale's P. C., 223; 4 Hawkins, 219, 245. Absence of counsel not favored: 18 Ga. R., 383. Indictment good: 37 Ga. R., 50; 10th, 46. Principal's conviction, its weight as evidence: 7 Ga. R., 2; 10 Peck. 477.

McCAY, Judge.

1. That a principal felon and an accessory before the fact may be included in the same indictment, with proper charges and averments against each, seems unquestionable. Such was the settled rule of the common law: Bullock *vs.* The State, 10th Ga., 47. And such would seem, in the nature of things, right and proper. They are, in a very proper sense, joint offenders, both concurring, at least in intent, in the crime.

2. Our Code, even as to the substantial averments in an indictment, only requires that they should be stated so as to be easily understood by the jury: Code, section 4535; and it seems directly contrary to the spirit of this enactment to require that the merely formal parts of the indictment shall conform to the letter to a provision the sole object of which was to make unnecessary the cumbrous formality of the common law proceedings.

3. When an indictment against several is called for trial, the whole case, as it stands, is announced. The defendants are asked if they be ready for trial. And if any one is not ready, he will be heard. If there be after this a severance, the Court proceeds to try them severally. When one has been tried, and his case disposed of, the Court proceeds with the next. As a matter of course, if any new complication occurs, if anything has, in the mean time, happened that

makes either the State or the accused less ready than at the announcement, the Court will hear and judge of it. But we see no more reason for a new call, because a trial of one of the joint offenders has intervened, than because any other temporary delay has occurred.

4. We have so often ruled that the granting or refusal of a continuance is in the discretion of the Court, under the special facts of each case, that we do not care to repeat our reasons. The absence of counsel would seem to be specially within this rule, since it must depend very much on the surroundings how material such absence may be. The Judge, knowing, as he does, the counsel, and seeing, as he does, all that transpires, has special means of getting at the truth. In this case, too, there is a serious defect in the evidence as to the reason of the absence of the counsel. Could any one be punished if the fact should turn out different from what was stated?

5. Until a new trial has been *granted* to the principal felon, he stands convicted. Even a *supersedeas* of the sentence only leaves matters as it finds them; it does not vacate the finding. The verdict of conviction stands until it is set aside. We do not think an actual motion—nay, even the granting of a rule *nisi*, would *require* a continuance of the case against the accessory; much less is this the case, when nothing appears but that the principal intends to move for a new trial.

6. The test of the juror's qualification is by the statute, fixed to be his having formed and expressed an opinion as to the *guilt* or INNOCENCE of the accused. Have the Courts authority to change this test? If they add to the test made by the law that prepared in this case, where are they to stop? It is very true that the guilt of the principal felon is an essential element in the guilt of the accessory, and one who has formed and expressed an opinion as to the guilt of the principal felon, has formed and expressed an opinion on a very material fact, necessary to be proven in order to establish the guilt of the accessory. But if the forming of an opinion as

to the truth of one of the necessary facts of the offense is to disqualify a juryman, who could be a juryman in a case of murder? The death of the deceased is, in all cases, a necessary and material fact to be shown. Is a juryman disqualified because he had formed and expressed an opinion as to the fact of the death of the deceased? And the same may be said as to many other facts. It may very well be that the principal felon is guilty, and the person charged as accessory not guilty. We are clear, therefore, that the juryman who has formed and expressed an opinion as to the guilt or innocence of the principal felon, is not, for that reason, disqualified from trying the accessory. Our statute prescribes the tests, forming and expressing an opinion as to the *guilt* or *innocence* of the prisoner, from having seen the crime committed, or from having heard any part of the testimony delivered on oath, prejudice or bias, etc., etc. Nor was it improper for the Judge, in a general way, to instruct the panel as to what the law was in the premises. This Court has approved of the practice, and we think rightly.

7. Perhaps the admission of this phonographic report was not strictly regular. As it did not appear to have been taken down under the direction of the Court, as prescribed by section 4636 of the Code, it cannot stand as a part of the magistrate's report. If admitted at all, it could only be on the faith to be given to it as sworn to at the principal trial by the phonographer, and it is not the usual course to permit a witness to reduce his testimony to writing, swear to it, and have it read as evidence. Though it may also with truth be said, that this phonographic report is by far the best evidence of what this statement really was; certainly it is better than any man's memory of what took place. In this case, the statement is very immaterial; there is nothing in it of confession, nothing that could have damaged the prisoner, and we will not grant a new trial.

8. Something is due, even in a criminal trial, to the public. Is the Court to sit and listen until it pleases the pris-

oner to stop? So long as his statement is pertinent to the issue, and not a continued repetition of what has been said, the Court ought to hear it. Charity and kindness requires much forbearance to one so situated. But even these have their limits, and we do not think the Judge did, in this case, in this matter, more than was proper.

9. We see no material error in the Judge's charge on the subject of insanity. In one sense, all crime is insanity. Indeed, in view of the awful responsibility of all of us to the Judge of the quick and the dead, any sin is a sort of insanity. But as the Judge justly said, society cannot afford to treat a man as insane because he has become so steeped in crime as to have stupefied his conscience. The Judge stated the rule of responsibility, from the words of this Court over and over again repeated, to-wit: Was the accused conscious he was doing wrong? Was his mind sound enough to judge of the right or wrong of his acts?

10. Upon the whole, we think this man guilty; perhaps the most guilty of the two engaged in this terrible tragedy, and affirm the judgment without hesitation. It is painful to be the instrument of the law in meeting out the reward to guilt, but it is a public duty.

Judgment affirmed.

MARY A. STROUPPER, administratrix, plaintiff in error, *vs.* HENRY MCCAULEY *et ux.*, defendants in error.

(BY TWO JUDGES.) The judgment on a mechanic's lien, under the Act of December 22, 1834, made general by Act of December 28, 1837, is not a judgment *in rem*, and hence does not conclude those claiming under a title adverse to the title of him who created the lien. 6th March, 1872.

Mechanic's liens. Judgments *in rem*. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1871.

For the facts, see the opinion.

B. A. THORNTON; W. F. WILLIAMS; BLANDFORD & CRAWFORD, for plaintiff in error. A judgment *in rem* concludes the world: Gr. Ev., secs. 541, 542, 543; Story on Conf. of Laws, secs. 593, 597: note 2, and cases cited; R. Code, sec. 3774; Cobb's N. Dig., 555.

MONTGOMERY, Judge.

This was a bill, brought by defendants in error, to compel the defendant, the present plaintiff in error, to deliver a house and lot in the city of Columbus to complainants, and for an account of the rents. The material facts are that one Peter Nolan, the father of Sarah McCauley, on his marriage with her mother, entered into a marriage contract, whereby he settled the premises in dispute upon his intended wife and her issue. Sarah McCauley was the only issue. Nolan left the State some short time after his marriage, which was in 1848, and has never been heard of since. Shortly afterwards, his wife died, and John B. Stroupper, her brother-in-law, took out letters of guardianship for the child, then two years old. The letters were granted in November, 1851. Before Nolan left the State, he employed one W. B. Robinson, a mechanic, to put repairs upon the house to the amount of $331 75. Robinson recorded his mechanic's lien, and sued it to judgment *against Nolan*, under the Act of December 22d, 1834, made general by Act of December 28th, 1837. The trustee, under the marriage settlement, was not a party to the suit, nor does it appear that he authorized the repairs.

In March, 1851, the property was sold under the *fi. fa.* issued upon the judgment, and bought by John B. Stroupper, and the title made to him, individually, by the sheriff. Stroupper died in possession of the property, and his wife, the plaintiff in error, became administratrix, and has possession of the property.

Henry McCauley married Sarah Nolan, and the bill is

brought by them for the purposes stated. The jury found for complainants.

There are several assignments of error, but the only one relied on by counsel for plaintiff in error, was the refusal of the Court to give the following charge: "That the said judgment, in favor of Robinson, to enforce his mechanic's lien, is a judgment *in rem*, and is conclusive upon everybody, and a sale of the property mentioned in said judgment, under the same, divested the title of the true owner, although such owner may have been a married woman or minor, and passed the title to Stroupper." If the premise of the counsel for the defendant is true, the conclusion he draws would necessarily follow.

What is a judgment *in rem*? "A judgment *in rem* is founded on a proceeding, not as against the person, as such, but against the thing or subject-matter itself, whose state or condition is to be determined. It is a proceeding (*i. e.*, the Judge means to say the *proceeding in rem* is) to determine the state or condition of the thing itself, and the judgment is a solemn declaration upon the *status* of the thing; and it *ipso facto* renders it what it declares it to be. The probate of a will is a familiar instance of a judgment *in rem*. The judgment is upon the thing itself; and when the proper steps required by law are taken, the judgment is conclusive upon all the world, and makes the instrument just what the judgment of the Court declares it ought to be." "Proceedings *in rem* may be, and often are, upon personal chattels, directly declaring the right to them, in such cases. The proceeding is for the supposed violation, by the property (so to speak) of some public law or regulation, by which it is alleged that the title of the former owner has become divested. The property being seized, a proceeding is then instituted against it, upon an allegation stating the cause for which it has been forfeited; upon which public notice is given, in some prescribed form, to all persons to appear and contest the allegation: Woodruff *vs.* Taylor, 20 Vermont, 65.

The Court, doubtless, had in view proceedings against goods for violations of the revenue laws. But this is not the only proceeding against personal chattels, which is a proceeding *in rem*. The familiar instance of a proceeding against a vessel and her cargo, for repairs, supplies, seamen's wages, salvage, etc., in a Court of Admiralty, is an illustration.

Again: "A judgment of outlawry not only declares the party an outlaw, but renders him so, and is, therefore, a judgment *in rem*:" Herman's Law of Estoppel, chapter I., p. 110, *et seq.*

"Proceedings in attachment are in the nature of, but not strictly a proceeding *in rem*. A proceeding *in rem* is that in which the process is served on the thing itself; and the mere possession of the thing itself, by the service of the process and making proclamation, authorizes the Court to decide upon it, without notice to any individual whatever." "The proceedings in attachment will not, in any way, affect the *status* of the property as to other persons than the parties to the record, and those claiming under them:" Herman's Law of Estoppel, chapter I.: "Judgments *in rem*," page 110 to 129; Drake on Attachment, section 5; Marshall, Chief Justice, in Mankin *vs.* Chandlee, 2 Brockenbrough, 125; Megee *vs.* Berme, 39 Pennsylvania State Reports, 50. "The limited proceedings *in rem*, before mentioned, (in attachment) are not based on any allegation that the right of property is to be determined between any other persons than the parties to the suit; no notice is sought to be given to any other persons, and the judgment being only as to the *status* of the property, as between the parties of record, it is as to all other persons a mere nulity:" Woodruff *vs.* Taylor, 20 Verm., 76. "A foreign attachment, under the law of Virginia, (and I apprehend the same is true under the law of Georgia,) is not a proceeding *in rem*. It is a suit by a plaintiff against a defendant, and a decree in such a case is conclusive evidence only against parties and privies. In every

case where parties are necessary to give the Court cognizance of the cause, the decree, the judgment or the sentence binds those only (with some few exceptions standing on particular principles,) who are parties or privies. If a party is necessary, it follows that the party should be one who has the real interest, and to secure this, the interest of persons who are not parties cannot be affected:" Mankin *vs.* Chandlee, 2 Brockenbrough, 125. "The same rule applies to proceedings in replevin, where the authority to seize specific property is given solely with a view to the determination of the right of property between the plaintiff and defendant; the judgment will not estop the subsequent assertion of a distinct and adverse title by a third person: Herman's Law of Estop., 131. "All actions brought for the recovery of title to land are in the nature of proceedings *in rem*, whether commenced by service *in personam* or by publication; yet the judgment is limited to the estate, and to those who have been made parties, either by service of process or by appearance. And the title of third persons is neither barred nor affected by an order or execution based on such judgment:" *Ibid*, 144. The effect and purpose of a proceeding *in rem*, strictly so-called, is to ascertain the right of every possible claimant, and it is instituted on an allegation that the title of the former owner, whoever he may be, has become divested, and notice is given to the whole world to appear and make claim to it:" Woodruff *vs.* Taylor, 20 Vermont, 65.

This is not the only purpose of a proceeding *in rem*, as already stated. There are two classes of judgments *in rem*, 1st. Judgments upon the *status* of individuals; as in judgments of outlawry, divorce, appointment of guardians, administrators, etc. And, 2d, judgments had on proceedings against *property* without suit against the owner. And these last seem to be confined to Courts of Admiralty, as the former are, (with the exception of outlawry) to the Ecclesiastical Courts. Indeed, the general rule is, that Courts of common law do not proceed *in rem:* 1 Kent's Com., (8th Ed.) 379;

3 *Ibid*, 220. Has the Legislature of Georgia given to her Courts this jurisdiction as against *property?* I know of no case, unless our steamboat lien law be so considered, and if it is, it has been decided that State Legislatures have no authority to create maritime liens or confer jurisdiction upon State Courts to enforce such liens by proceedings *in rem*. Such jurisdiction is vested exclusively in the Courts of Admiralty of the United States: Deever *vs.* Steamer Hope, A. L. R., 683. The Belfast, 7 Wall, 634.

Judge Story, and Mr. Greenleaf, after him, say proceedings in attachment "are also treated *as in some sense* proceedings *in rem*, and are deemed entitled to the same consideration:" Story's Conflict of Laws, section 592; 1 Greenleaf, section 342. I think, however, the statement is to be taken with the qualifications laid down in the authors hereinbefore quoted. If, then, a judgment *in rem* is herein correctly set-out, it is very clear that the judgment under consideration is not of that class. It was a *suit* against Nolen. Service doubtless effected on *him*, certainly not on the land. It was not an attack on the title of the land, but a proceeding to subject the land to the payment of Nolen's debt, which necessarily presupposed Nolen's titled valid. It was not a proceeding "to ascertain the right of every possible claimant." Nor was it "instituted on an allegation that the title of the former owner, whoever he might be, had become divested." It was levied on *as the property of Nolen to answer for his debt*. The proceeding sought to obtain a judgment (and did obtain it) by means of which, and by the usual process of a sheriff 's sale, *Nolen's* title might be divested, not a judgment declaring that his title, as well as that of every one else, *had become divested at the time of the institution of the proceedings against the property*. It was certainly less of a proceeding *in rem* than an attachment, which we have seen only binds the parties and their sureties.

The principles of the maritime law were certainly not intended by the Legislature to apply so as to place the me-

chanic in the position, with reference to the property, he would have been in had he repaired a foreign vessel in the port of Savannah, (he could not proceed *in rem* against a home vessel, 1 Kent, 379, unless specially authorized by statute.) Those principles are founded on reasons entirely inapplicable to a case like the present. In the case of the vessel there is no owner upon whom process can be served, and the property itself is liable to take the wings of the morning and fly to the uttermost parts of the earth at any moment. A vessel under maritime law is treated more as was the debtor under the Jewish law; it is liable to be sold for *its* debts, rather than the debts of its owners, and this in furtherance of the best interests of commerce. In the present case, the owner must be first sued before the property can be subjected.

Had Nolen resided in a county different from the county in which the land lay, would not the suit, provided for by the 6th section of the Act of 1834, have been brought in the county of his residence, and service have been perfected upon *him*, not on the property by seizure? If the position of plaintiff in error be correct, is not a foreclosure of a mortgage a proceeding *in rem?* And of course if it is, it must conclude everybody. Indeed it is much more certainly a proceeding *in rem* than the present, if our universal practice of foreclosing in the Superior Court of the county where the land lies, instead of in the county of the residence of the mortgagor, when he resides in a different county from that in which the land is, is constitutionally correct.

Judgment affirmed.

W. H. YOUNG, plaintiff in error, *vs.* CHARLES WISE, defendant in error.

(BY TWO JUDGES.)—1. When a case is carried to the Supreme Court by defendant, and a *supersedeas* bond given, on affirmance of the judgment, plaintiff is entitled to have a *fi. fa.* issued against both principal and surety without entering up formal judgment upon the bond.

2. When cotton was loaned, during the late war between the Confederate and United States, and a contract entered into for the return of the same quality and quantity of cotton to the lender at the end of the war, or at any time agreed upon between the parties, the contract is subject to the Relief Act of 1870, and the tax affidavit must be attached to the *fi. fa.* issued upon a judgment founded on such contract, before levy.

3. Where plaintiff in *fi. fa.* makes the tax affidavit, and defendant files a counter-affidavit, denying that the taxes have been paid, as defendant is informed and believes, the issue as to the payment of the taxes should be submitted to the jury. 5th March, 1872.

Principal and Surety. Relief Act of 1870. Jury Trial. Constitutional law. Before Judge JOHNSON. Muscogee Superior Court. June, 1871.

The facts are in the opinion.

H. L. BENNING, for plaintiff in error.

PEABODY & BRANNON, for defendant.

MONTGOMERY, Judge.

Wise obtained judgment against the Eagle Manufacturing Company, on a debt due him for a loan of cotton made in 1864, and which was to be returned in kind, at the close of the war, on demand or at such other time as the parties should agree on. No other time was agreed on, and the demand was made in 1866, and payment refused.

The company excepted to the judgment, and carried the case to the Supreme Court, giving a *supersedeas* bond with Young as surety. The judgment was affirmed, and the Clerk issued execution on the bond without entry of formal

judgment thereon. Plaintiff, Wise, attached an affidavit of payment of taxes to his *fi. fa.* as required by the Relief Act of 1870, and defendants filed a counter-affidavit of illegality, denying the payment of taxes by plaintiff, as defendants were informed and believed. Plaintiff testified he had not paid any taxes because none were due, he being a non-resident of the State. He did not swear that he was a non-resident at the creation of the debt and had been so continuously since. The *fi. fa.* was levied on one hundred and fifty shares of the Eagle Manufacturing Company, belonging to Young, the surety, and a return of *nulla bona*, as to the principal, made. Young moved to quash the execution because there was no formal judgment entered on the bond. The Court overruled the motion, and dismissed the illegality, "on the ground that the debt on which the *fi. fa.* is founded is not an old debt, and is not included in the Act of 13th October, 1870, to extend the lien of set-off and recoupment as against debts contracted prior to June 1st, 1865."

1. We think the Court was right in refusing to quash the execution. It is admitted that the statute of October 29th, 1870, in connection with Code sections 4222, 3513, 3612, allows the issue of the execution "without further proceedings."

But this is said to be unconstitutional—that the surety is entitled to a jury trial: Constitution of Georgia, Art. V., Section 13.

But section 3, paragraph 3, of same article, says: "The Court shall render judgment without the verdict of a jury in all civil cases founded on contract, where an issuable defense is not filed on oath." True, the Clerk issues execution here without formal judgment. Of that presently. If the defendant has an issuable defense, his affidavit of illegality will bring it before a jury, as will appear in this very case.

If this position of counsel be tenable, then all laws providing for giving bonds, and the subsequent proceedings thereon, in replevies, in attachments, appeals, claims, stay of execu-

tions, etc., are unconstitutional. The right of trial by jury is only to "remain" inviolate, *i. e.*, to remain as it existed before the Constitution. Most of these laws existed before the Constitution, and though the Constitution of 1798 contained a similar provision, yet no one ever thought to question them under its provisions. The present Conttitution has adopted the language of the Constitution of 1798, with the received interpretation indicated by the passage of these Acts, and action under them for very many years.

The case of *Tift and others vs. Griffin*, 5 Georgia, 185, would seem at first view to lend some support to the position of counsel for plaintiff in error. But in the very next case in the same volume, the *Flint River Steamboat Company vs. Foster*, 5 Georgia 194, the question is exhaustively considered by Judge Lumpkin, whether as effected by the Federal or State Constitution, and the conclusion now arrived at by the Court elaborately sustained. See the case, and especially page 213, where the Bank of Columbia *vs.* Oakley, 4 Wheaton, 235, is quoted and approved. This last case was an issue of execution by the Clerk, at the instance of the Bank, upon a note which the defendant permitted to go to protest. The proceeding was had under a Maryland statute, which authorized it to be done *without judgment.* The objection was taken, that it violated both State and Federal Constitution, as to the right of trial by jury.

The Supreme Court of the United States sustained the constitutionality of the Act, and so, afterwards, did the Supreme Court of Maryland, in Bank of Columbia *vs.* D. Ross, 4 Hare and McHen., 455. The case before the Supreme Court of the United States would seem to be identical in principle with the case now under consideration. In both, the Clerk is authorized to issue execution without judgment. If the execution was good in that case, it must be in this.

2. We think, however, that the debt was such an one as the Relief Act of 1870 required the taxes to be paid upon and the affidavit filed. Had it been a promissory note, pay-

able on demand in cotton, it will hardly be questioned that it was taxable. We do not perceive the difference, for the purposes of taxation, between a debt of the present character and a note payable in specifics.

3. As the counter-affidavit made a distinct issue of fact, we think the issue should have been submitted to the jury.

Judgment reversed.

ALLEN, PREER & ILGES, plaintiffs in error, *vs.* CHARLES M. SMITH, defendant in error.

(BY TWO JUDGES.)—Where S. furnished land and the necessary means to make a crop to a freedman, under a contract that the crop was to be the property of S. until his advances were returned, for which purpose he was to sell the crop, and return any surplus to the freedman, and the cotton made was carried to the gin house of S., there ginned and packed and left for several days, this constituted sufficient possession in S. to enable him to sue out a possessory warrant for the cotton, which had afterwards been secretly carried off by the negro and sold. 5th March, 1872.

Possessory Warrant. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1871.

The facts are in the opinion.

PEABODY & BRANNON, for plaintiffs in error. The judgment of a Justice of the Peace in possessory warrant reversable, though some evidence to sustain it: 37 Ga. R., 580. The contract and possession was only for security, and gave no title: 43 Ga. R., 262. Such possession not good basis for possessory warrant: 40 Ga. R., 329.

MOSES & DOWNING, for defendant.

MONTGOMERY, Judge.

The defendant in error made a contract with a freedman, by which he was to furnish land, all necessary horse-power, provisions, etc., which the freedman was to use, in making a crop. The crop was to belong to Smith, until all his advances were paid. He was to sell the crop, pay himself, and give the surplus, if any, to the freedman. The crop was made, (three bales of cotton), gathered, carried to Smith's gin-house by the freedman, ginned, packed and there left. It was worth less than the advances made by Smith to the freedman. The gin-house was half a mile off from the land on which the cotton was made. The cotton remained several days at the gin-house, when, during Smith's absence from home, the freedman, without his knowledge or consent, carried it to Columbus, and sold it, and so it came into the possession of the plaintiffs in error. Smith took out a possessory warrant before a magistrate. The magistrate awarded the cotton to him. A *certiorari* was sued out, the judgment of the magistrate affirmed, and the case brought here.

We see no error in the ruling. The crop had been made and delivered according to the contract. Smith had possession at the time. It was unlawfully taken by the freedman.

Judgment affirmed.

J. A. & W. H. CODY *et al.*, plaintiff in error, *vs.* J. LENNARD, tax-collector, defendant in error.

(BY TWO JUDGES.)—The writ of prohibition does not lie against a tax collector who is alleged to be proceeding to levy an illegal tax. The parties complaining must pay the tax, and then pursue their remedy against the tax collector as an individual. 12th March, 1872.

Judicial interference with taxes. Before Jukge JOHNSON. Muscogee Superior Court. May Term, 1871.

J. A. & W. H. Cody and various others, averred as follows: The Tax Act of 18th March, 1869, levied a specific tax, for educational purposes, of twenty cents per gallon on every gallon of brandy, etc., sold by any person in quantities less than thirty gallons, requiring vendors of such liquors to make a quarterly return to the tax-collectors of the quantity sold by them, and pay the tax, and, upon failure to do either, the tax collector shall assess against such person a specific tax of $1,000, and proceed to collect it. Each of them is a citizen of said county, and a seller of such liquors. By the Constitution, no such specific tax can be laid, except for the support of common schools. The General Assembly has established no system of common schools, but, on the contrary, had directed that the poll-tax of 1868, 1869 and 1870, which belonged to the school fund, be not collected, because no such system had been established. Nay, more, they have used up all the educational fund raised by poll-tax and specific taxes, by the Constitution devoted solely to educational purposes. It is, therefore, unconstitutional to collect such taxes on liquors. Nevertheless, said Lennard, tax collector, insists upon their making returns and paying taxes, as aforesaid; and if they fail or refuse to make the return, and pay the taxes, he will collect the $1,000 specific tax. They prayed that he be prohibited from requiring said returns, and collecting said taxes. He was required to show cause why the prohibition should not be granted. He answered that he was proceeding under the law and the instructions of the Comptroller General to collect said taxes, denied the non-existence of a common school system in Georgia, and said that the Act in question was constitutional. The writ of prohibition was denied, and of that complaint is made here.

H. L. Benning, for plaintiff in error. The Act of 1869 is unconstitutional, because there is no common school system: Constitution, Article 6, sections 1, 2, 3; Article 1, section 27. No such school system was inaugurated till by the

Act of October, 1870. See School Act. *Kenney et al., vs. Harwell*, May, 1871, does not decide this case. Prohibition is the remedy: Revised Code, sections 3145, 3146, 3148 Constitution, Article 2, section 32. Judicial interference confined to taxes *under the Code:* Revised Code, section 3618. By Constitution right to appeal to Courts not to be impaired: Constitution, Article 1, section 5.

B. A. THORNTON, Solicitor General. A school system was inaugurated before this tax was demanded: See *Kenney et al., vs. Harwell & McCowan vs. Davidson et al.*, decided last Term.

MONTGOMERY, Judge.

This was a petition for the writ of prohibition against the tax collector of Muscogee county, to prevent the collection of twenty cents per gallon on liquors sold by the petitioners, and also to prohibit him "from assessing and collecting from them a tax of $1,000 should they fail to pay said liquor tax," under the Tax Act of 1869.

The Court refused to grant the writ, (upon what ground is not stated) and his decision is excepted to. As the tax collector distinctly makes the issue in the record that the Court is prohibited from interferring, by Revised Code, section 3618, we presume the decision of the Court is based upon that section. At least, two cases have lately been before this Court, where it was sought to restrain the tax collector by injunction, from collecting taxes alleged to be illegal, in neither of which does the present question appear to have been made, and the Court proceeded to pass upon the merits of the case: *Kenney et al., vs. Harwell*, 42 Georgia, 416. *McCowan, tax collector, vs. Davidson et al.*, from the Eastern Circuit, July Term, 1871. It might well be that the Executive desired the question made in this shape before the Courts in order to inform his conscience as to whether he should enforce the collection of an alleged illegal tax, and so waived the question of jurisdiction. In the earlier decisions of the Court, however,

it is laid down, that no judicial interference with the collection of a tax due the State can be had. The Tax Act of 1804 reads "no replevin shall lie, or any judicial interference be had, or (in?) any levy or distress for taxes under this law, but that the party injured be left to his proper remedy in any Court of law." Judge Lumpkin, after quoting the Act in *Vanover et al., vs. Justices of the Inferior Court*, 27 Georgia, 357, says, "The judicial interference forbidden here is for any levy or distress for taxes, under the Act of 1804, which is still of force, and the basis of all our general tax laws. By strict construction, the inhibition would only apply to the Act of 1804. It is but right, however, to extend it to all tax laws in favor of the State, and amendatory of the Act of 1804." The language of the Code, section 3618, is precisely the same with the Act of 1804, with the exception that "under the provisions of this Code," is substituted for "under this law." The same interpretation should be given to it, and the prohibition extended to interference with collection of taxes under Acts subsequent to the Code. The principle embodied in these laws is perhaps correct, and the reason is thus stated by Judge Benning, in *Eve vs. The State*, 21 Georgia, 59: "On general principles is it not best that this power should be withheld from the Courts? How could a government calculate with certainty upon its revenues, if the collection of the taxes was subject to be arrested in every instance in which a tax-payer or a tax collector could make out, *prima facie*, a technical case for arresting such collection. Far better is it, I think, to let the individual pay to the government what it demands of him, at the time of the demand, as he will be certain to get it back with interest, after more or less of delay, if it was not due." See also *Yancy vs. The New Manchester Manufacturing Company*, 33 Georgia, 622. The view we take of the case makes it unnecessary to consider the other questions raised.

Our judgment is, (keeping in view that the effort here is to restrain the collection of a tax due *the State*, it not being

our intention to overrule the case of *Vanover vs. The Justices of the Inferior Court*, 27 Georgia, 354,) that the prohibition does not lie in this case.

Judgment affirmed.

FELIX MCARDLE, administrator, plaintiff in error, *vs.* BULLOCK & RADCLIFF, defendants in error.

(BY TWO JUDGES.)—1. It is too late for an administrator, after he has been, by *scire facias*, made a party to a suit against his intestate and another on a contract, to plead or object that the suit is such an one on its face, as must go on against the survivor alone.

2. A suit against two as joint contractors, is not a suit against them as partners, simply because the bill of particulars attached to the declaration is an account against them by their several sirnames, the christian name of neither being mentioned, and the sirnames being connected with the character.

3. In a joint suit against two, even after a plea in abatement by one of misjoinder, the plaintiff may discontinue as to one, and if his proof sustains his action, as amended, he may recover against one alone.

4. When interrogatories are taken out by the defendant and crossed by the plaintiff, and both the direct and cross-interrogatories are answered and the defendant introduces and reads to the jury the answers to the direct interrogatories, failing to read the answers to the cross-interrogatories, and the plaintiff reads the answers to the cross-interrogatories, he does not thereby make the witness his witness, so that he cannot impeach him. The answers, to take the direct and cross-questions, are the evidence of the party who offers to the jury the return of the commissioners.

(To read the direct answers to interrogatories and leave the other side to read the answers to cross-interrogatories, is not a correct practice. R.)

5. This Court will not interfere with the province of the jury to pass upon the facts unless the verdict be so grossly contrary to the testimony as to justify the inference of mistake, fraud or prejudice. 5th March, 1872.

Practice. Bill of Particulars. Pleading. Interrogatories. Impeaching witnesses. Before Judge JOHNSON. Muscogee Superior Court, May Term, 1871.

Bullock & Radcliff averred that "Julius Zorkowski and Thomas Brassell" were indebted to them $85 00, as would fully appear by a bill of particulars attached. The bill of particulars was headed as follows: "Zorkowski and Brassell to Bullock & Radcliff, Dr." Both defendants were served. *Pendente lite*, Brassell died and McArdle became his administrator. *Scire facias* to make him a party was served upon McArdle and he was made a party. Zorkowski pleaded that he had paid the debt sued for. McArdle pleaded the general issue and that Brassell was never Zorkowski's partner, and that he never, jointly with Zorkowski, undertook and promised as charged.

McArdle demurred to the declaration upon the grounds, 1st. That, as administrator, he could not be joined with Zorkowski as surviving partner in an action upon an open account. 2d. That Brassell and Zorkowski were not averred to be partners, nor was it averred that said claim was a joint claim against them. The demurrer was overruled. Waiving all defects of form, plaintiffs demurred to the second and third pleas of McArdle, and the Court sustained that demurrer. While plaintiffs were introducing their evidence they amended their declaration by discontinuing as to Zorkowski. McArdle again demurred to the declaration as amended, (upon what ground does not appear) but the Court overruled his demurrer.

Plaintiffs introduced evidence to support their claim. Defendant read the answers of Zorkowski to direct interrogatories. He did not read the answers to the cross-interrogatories. Plaintiff read these answers to the cross-interrogatories, and introduced evidence to contradict Zorkowiski's testimony as to his having paid the account. This was done over McArdle's objection.

The plaintiff obtained a judgment against McArdle. He moved for a new trial, averring that the verdict was contrary to the evidence, and that the Court erred in said rulings

against him. The Court refused a new trial, and error is assigned on said grounds.

MOSES & DOWNING, for plaintiff in error. The contract was with a firm, and the suit against the members only. This is bad: 24 Ga. R., 628; 1 Ch. Pl., 29; 1 Kelly, 493. McArdle's pleas were good: Gould's Pl., 103–4–5. The demurrer to the amended declaration was well taken: Gould's Pl., 114, 115; Chit. Pl., 42, 44, 45; R. Code, sections 3435, 3274–5. Plaintiffs having read Zorkowski's cross-interrogatories as evidence could not impeach him: R. Code, section 3181–3; 1 Gr. Ev., sections 442, 445. The verdict was contrary to evidence: 41 Ga. R., 94, 127.

PEABODY & BRANNON, for defendant.

McCAY, Judge.

1. The issue on a *scire facias* to make an administrator a party to a suit pending against one who is dead, is whether or not the person served is a proper party, in the capacity in which he acts. And if the suit be one that does not survive at law against the intestate's estate, "he ought to make the question before he is made a party.

2. It would be giving far more force, to the mere heading of a bill of particulars than seems proper, to allow it to control the formal allegations of the declaration. These defendants are sued in the body of the declaration, as joint contractors, and the bill of particulars charges the items to A and B. This is not strictly formal, but would any one say that a suit against John Smith, would be vitiated by a bill of particulars, headed Smith only. Indeed, it is doubtful, if the name of the party need be stated at all in the bill of particulars. The name is in the declaration, and the bill of particulars is a mere detail of the items going to make the gross sum sued for.

3. At most, the defect in this case is a mere variance, and not good after judgment. Our statute of amendments is very broad. Code, sections 3435 and 3436, expressly allow a defendant to be stricken out, and if there be no other legal difculty, that is, if the proof sustains the declaration, as amended, the plaintiff may proceed to judgment.

4. Interrogatories, when crossed and executed, are the evidence of the party who offers to the jury the report of the commissioners. If the practice of the Court permits the party bringing them in, to read, in the conduct of his case, only the direct answers, it is a new practice to us. We do not see why a party is not entitled to have his crosses go in with the direct, just as they would if the witness were on the stand. How is one to lay the foundation for impeaching a witness, if by asking him cross-questions and introducing his answers he makes him his own witness? How is one to get any explanation, or any fact, but by a cross, from a witness he is able to cast discredit upon, or who occupies such a relation to the case, as that he is interested, or has been guilty of a crime? We are clear, that by reading the crosses to a set of interrogatories, if the other side have read the direct answers, the party reading the crosses does not adopt the witness as his own, and he may discredit him, as he may any other witness of the other side.

5. The evidence in this case is not very strong, but there is sufficient to sustain the verdict. This Court is not a jury, and this is such a verdict as is not *illegal* under the evidence.

Judgment affirmed.

WILLAM M. PETERS, plaintiff in error, *vs.* J. J. BRADFORD, sheriff, *et al.*, defendants in error.

(BY TWO JUDGES.)—A non-resident plaintiff in *fi. fa.*, whose judgment was obtained on a debt, contracted prior to June, 1865, may claim money brought into Court by junior judgments without attaching the affidavit of payment of taxes required by the Act of 1870, when his non-residence appears by affidavit or other proof. 5th March, 1872.

Relief Act of 1870. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1872.

Bradford, sheriff, had in hand a fund for distribution among the judgment creditors of Winter. Peters had the oldest judgment against Winter, and asked that it be first paid, because it was founded upon a contract made before June, 1865; and Peters had filed no affidavit as to payment of taxes on the claim, as required by the Relief Act of 1870. The Court refused to let him be paid, and ordered the sheriff to pay the junior judgments, notwithstanding, Peters offered to prove that, since the creation of the debt, he had never resided in Georgia. This ruling is assigned as error.

L. T. DOWNING, for plaintiff in error.

H. L. BENNING, for defendants.

MONTGOMERY, Judge.

Peters' execution was founded on a debt created before June, 1865. The executions of other creditors, claiming the funds in the hands of the sheriff, were founded on debts created since June, 1865. Peters had paid no taxes, but offered to prove his non-residence, in Georgia, since the creation of the debt, and asked an order directing the sheriff to satisfy first his execution, which was the oldest. The Court required him to prove payment of taxes on his debt, and, on his failure to comply, refused his order, and passed one directing the sheriff to pay the money over to the junior executions. Peters excepted.

The case is controlled by the decision of this Court in *Williams vs. Mandell*, delivered September 26th, 1871, after Judge Johnson decided this case. The plaintiff (Peters) should have been allowed to prove his non-residence. The proof made, no taxes were due, and his execution was entitled to priority, so far as the objection made is concerned.

Judgment reversed.

B. F. BORAM, plaintiff in error, *vs.* KENCHEN THWEATT, defendant in error.

(BY TWO JUDGES.)—When, under the declaration, pleas and evidence in a case, the jury has done substantial justice between the parties, this Court will not reverse the judgment on mere technical grounds, but will give such direction to the cause as will correct the error and yet not open the dispute for further litigation. 5th March, 1872.

New Trial. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1871.

Thweatt brought trover for a bale of cotton against Boram, averring that he converted it in January, 1870. Boram defended upon the ground that, by an arbitration, he had settled with Thweatt about this cotton. The plaintiff proved that Boram got his bale of cotton, and sold it, and its value. It appeared, from the evidence, that Boram hired Thweatt, a negro, to work for him, in 1869; and they agreed that one Torry should decide all matters of dispute that might arise between them, and Thweatt promised to pay Torry $50 for his advice and care for his interests. Boram and Thweatt differed about their accounts, and, in November, 1869, submitted to Torry and Jones, as arbitrators, "all matters in dispute" between them. In March, 1870, they made an award, by which they brought out Boram in Thweatt's debt only $40. In their accounting, the arbitrators charged Boram with the bale of cotton, and charged Thweatt with the $50

which he had promised Torry, and which, they decided, Boram should pay Torry. Thweatt's counsel contended that the award could not cover this cotton, because the conversion was after the submission was made. The reply was that the award was after the alleged conversion.

Various points arose in the case, but none of them are necessary for an understanding of the opinion. The jury found for the plaintiff for $97 and costs. The refusal of a new trial is assigned as error.

CHAPPEL & RUSSELL, for plaintiff in error.

THORNTON & SPENCER, by PEABODY, for defendant.

McCAY, Judge.

Whilst there is some difficulty in sustaining the verdict in this case, under technical rules of law, yet we are satisfied that substantial justice has been done between the parties. The arbitrators had, under the submission, no jurisdiction over this bag of cotton, as it had nothing to do with the matter submitted to them, whilst their appropriation of $50 to the adviser of this colored man, for his advice, was, under the circumstances, rather a high-handed measure. Under our liberal system of pleading we have concluded to sustain the judgment of the Court, on condition that the plaintiff write off the difference between the verdict and the value of the cotton, as proven, and agree, in the record, not to set up any claim to the $40 allowed him by the arbitrators. This will be substantial justice, and will prevent any further cost and expense to the public over this dispute.

Judgment affirmed upon conditions.

P. H. HARTMAN, plaintiff in error, *vs.* THE MAYOR AND COUNCIL OF COLUMBUS, defendant in error.

(BY TWO JUDGES.)—Where two actions are brought by the same plaintiff against the same defendant, in a Magistrate's Court, at the same term, on several promissory notes given for the same consideration, at the same time, and payable to plaintiff, the defendant is entitled to have them consolidated: *Provided*, that when consolidated, the aggregate amount does not oust the Court of jurisdiction. (R.) 5th March, 1872.

Practice. Consolidating actions. Before Judge JOHNSON Muscogee Superior Court. May Term, 1871.

The facts are in the opinion.

H. L. BENNING, for plaintiff in error, cited 2 D. and E. R., 639; 1 Tidd's Pr., 614; 3 Ch. Pr., 643.

BLANFORD & CRAWFORD, for defendant, cited Acts 1868, Justices jurisdiction, R. Code, section 3196.

MONTGOMERY, Judge.

The Mayor and Council of Columbus brought two suits against the plaintiffs in error, in a Magistrate's Court, at the same term, the first on five promissory notes for $10 each, and the second on four—each of these also for $10—the whole amounting to $90—less than the jurisdictional limit of the Court. Defendant moved to consolidate the two cases, which motion the Court overruled, and the Superior Court, on *certiorari*, sustained the ruling.

Was the defendant entitled to have the cases consolidated? We think so. The hardship of having to bear the costs in many cases, where they might be reduced to one without detriment to the plaintiff, is well pointed out by Judge Harris, in *The Manufacturers' Bank of Macon, vs. Goolsby*, 35 Georgia Reports, 82.

The consolidation in that case was refused, only because it would oust the jurisdiction of the Court. Here no such re-

sult would follow, and the Code, section 481, would seem to exclude the right of the plaintiff to bring several suits in a Magistrate's Court, unless the aggregate amount of the debts sued on, would be more than the sum over which the Court had jurisdiction. Our judgment is confined to cases in a Magistrate's Court.

Judgment reversed.

STANFORD & GOLDEN, plaintiffs in error, *vs.* J. J. BRADFORD, sheriff, *et al.*, defendants in error.

(BY TWO JUDGES.)—1. In an issue formed on a motion to distribute money between judgments one plaintiff in *fi. fa.*, cannot attack the judgment of another plaintiff in *fi, fa.*, on the ground of irregularities previous to the judgment; the defects to be subject to his objection must be such as are not amendable.

2. In a joint suit against several, if one be not served, the plaintiff may dismiss as to the one not served; and if he go on to the jury and get a verdict, the verdict is good against those served, though there be a failure to dismiss against the defendant not served. The defect is a mere irregularity, and does not make the judgment void. 5th March, 1872.

Attacking Judgments. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1871.

There was in the hands of Bradford, sheriff, a fund raised by the sale of the joint or partnership property of "steamer Chipola and owners." Booher, Fee & Company had the oldest judgment, but Stanford & Golden's counsel introduced the record upon which the judgment was founded, and showed that, 1st. One of the joint owners was never served; and contended, 2d. That the judgment of Booher, Fee & Company was bad, because the record showed that they sued defendants as joint owners upon a credit given to them as partners. The Court ruled that Booher, Fee & Company's judg-

ment being older than Stanford & Golden's, was entitled to the fund. That is assigned as error.

L. T. DOWNING, for plaintiffs in error. As to first point cited: Revised Code, section 2274–5; 12th Georgia Reports, 30; 14th, 589; Booker *vs.* Worrill, July Term, 1871. On the second point: 24 Georgia Reports, 625; 1 Chancery Pleadings, 29.

PEABODY & BRANNON, for defendants. As to amendable defects: 3 Georgia Reports, 81; 23d, 602; 40th, 129; Revised Code, sections 3529, 3532. Judgment binds joint property though but one joint owner served.

McCAY, Judge.

1. This case turns upon the construction to be given to section 3538 of the Code. That section provides that creditors and *bona fide* purchasers may attack a judgment for *any defect* appearing on the face of the record, or pleading, or for fraud or collusion, whenever and wherever it interferes with their rights.

Does this mean that a creditor or *bona fide* purchaser may attack a judgment, etc., for a mere irregularity? That, in one sense of the word, is a defect, it is true; but this section is to be taken with section 3536, which provides that judgments shall not be attacked collaterally for a mere irregularity. It was not the intent of the codifiers to change the old law. And in construing the Code this intention ought not to be assumed. The rule on this subject has long been well settled. For want of jurisdiction a judgment may be attacked collaterally. This may also be done by a stranger if the judgment be so defective as that it is null and void. The distinction between a mere irregularity and a defect which renders the judgment void, is not very definitely established. The best marked distinction we take to be this: A mere irregularity is amendable; under our law, is cured by a judg-

ment; and any thing, which if objected to, could have been amended, does not render the judgment void: McNamera on Nullities and Irregularities, 6.

2. Very clearly this defect, so far as the defendant served is concerned, was amendable under our law. A plaintiff may dismiss any party of several from his suit. The judgment is null against the party not served, but the plaintiff at any time before judgment might have amended by striking out the one not served. Such is the distinct provision of the Code, (section 3435,) whatever may have been the law before. This defect was therefore, under the rule, a mere irregularity, amendable, and not such a defect as renders the judgment void. It cannot, therefore, be attacked collaterally.

Judgment affirmed.

E. B. KELLOGG, plaintiff in error, *vs.* JOHN W. BROOKS, defendant in error.

(BY TWO JUDGES.)—It is sufficient to excuse the filing of an affidavit, as required by the Act of October, 13, 1870, that the plaintiff alleges in his declaration, or claims before the Court that he is and has been a non-resident, it must be shown to the Court by the plaintiff's oath, or by other proof that the fact of such non-residence is the truth. 5th March, 1872.

Relief Act of 1870. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1871.

This cause of action was founded upon a contract made prior to June, 1865. Plaintiff filed no affidavit that he had paid taxes on the debt, as required by the Relief Act of 1870, and, for this, defendant's counsel moved to dismiss the cause. The plaintiff's counsel amended his declaration by averring that when said contract was made, and ever since plaintiff was a citizen of New York, and resided there. No affidavit

being filed, the cause was dismissed. That is, assigned as error.

L. T. DOWNING, for plaintiff in error.

SMITH & ALEXANDER, for defendant. Non-residence does not remove necessity for affidavit: *Brewer vs. Broodfield.*

McCAY, Judge.

By any fair construction of the Act of October 17, 1870, it would seem that to make out a case of exception to the statute, it is not sufficient to allege the facts in the declaration, either at the commencement of the suit or by way of amendment. It would be easy, in this way, to evade altogether that section of the Act which requires the affidavit to be filed. It is a small matter to make a statement in a declaration; and if this supersedes the necessity of the affidavit required, that section of the Act might as well not have been inserted. We have held, in several cases, that to excuse the filing of the affidavit, there must be either an affidavit of facts, making out the case of exception, or it must appear by the proof, or it must exist in the very nature of the cause of action.

Judgment affirmed.

WILLIAM PERRY *et al.*, plaintiffs in error, *vs.* ROBERT M. GUNBY, defendant in error.

(BY TWO JUDGES.)—When a bill of exceptions was carried to the Supreme Court without a motion having been made in the Court below for a new trial, which bill of exceptions was dismissed, and the plaintiff in error, at a subsequent term of the Superior Court, makes a motion for a new trial, he can only include in the motion such grounds as were not included in the bill of exceptions. The fact that some of those grounds were imperfectly stated, and might possibly have been stricken out on motion of defendant in error, does not vary the rule.

2. There being some evidence to show a misrepresentation of a material fact by the plaintiff in error in this case, which was acted on by the defendant in error, the judgment of the Court below refusing a new trial on the allegations that the verdict was contrary to evidence and the weight of evidence and contrary to law and the equity and justice of the case, will not be disturbed. 5th March, 1872.

Res Adjudicata. New trial. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1871.

This cause was here at the instance of Perry *et al.*, at June Term, 1870, and was dismissed without a hearing. See 41 Georgia Reports, 415. It was here again upon a question not affecting the merits, in January, 1871. See 42 Georgia Reports, 41. The necessary facts for understanding the opinion are embodied in it.

MOSES & MOSES; CHAPPELL & RUSSELL, for plaintiffs in error.

H. L. BENNING, for defendant.

MONTGOMERY, Judge.

This case was a bill in equity, in Muscogee Superior Court, brought by Gunby, to set aside a conveyance he had made to Mahone, as trustee for Mrs. Perry, and to oust them and restore the possession to Gunby. The trial took place at the November Adjourned Term, 1869, and a verdict and decree were rendered setting aside this conveyance, and ordering the ouster and restoration prayed for by this bill. The defendants to the bill did not, at that term, apply for a new trial, but took the case up to the Supreme Court, by bill of exceptions to various rulings, decisions and charges, and refusals to charge on the part of the Court, during the progress of the trial.

The bill was returnable to the June Term of the Supreme Court, 1870, but was never heard there on the merits. When it reached its order it was, on motion of Gunby's counsel,

dismissed on the sole grounds of the non-transmission of the records and bill of exceptions from the Court below within the time required by the rule of the Supreme Court. Wherefore, at the next ensuing term of the Muscogee Superior Court, the defendants to the bill, Perry and wife, and Mahone, made an application for a new trial, based on all the grounds contained in the bill of exceptions, which the Supreme Court had dismissed, and divers other grounds besides. This application was refused on the grounds that the said dismissal of the Supreme Court, and its judgment thereon operated as a bar to the application, to which decision Perry *et al.* excepted, brought their bill of exceptions to this Court, January Term, 1871, and the same was heard and decided here at said Term, and the said decision of Muscogee Superior Court was *reversed*, upon the ground that the Court erred in determining that the defendants were barred from making a motion for a new trial, in the case on *other* grounds than those contained in the bill of exceptions, which had been dismissed by the Supreme Court. This judgment was duly remitted and made the judgment of the Court below, and entered on its minutes at the May Term, 1871, and a new trial asked for in accordance thereto, and refused by said Court in general terms, and without specifying the particular grounds of refusal.

1. Whereupon the defendants excepted, and brought the case up to this Court, upon the present bill of exceptions. And now the questions before the Court are — 1st. What are the grounds contained in the second bill of exceptions, other than those contained in the first one, which had been dismissed by this Court? 2d. Are those other and additional grounds such as to entitle the defendants to a new trial? Those other and additional grounds are as follows, as is shown by a comparison of the two bills: 1st. That the verdict was contrary to evidence, and the weight of evidence. 2d. That it was contrary to law, and the equity and justice of the case. There were other grounds set forth in the pres-

ent bill of exceptions, which had been set forth in the first bill of exceptions, that had been dismissed. Counsel for plaintiff in error insisted that they were therein set forth, defectively, and might have been stricken on motion of defendants in error, had that bill been heard on its merits, and that, therefore, the judgment of dismissal was no bar as to those grounds of error. We do not think this position of counsel is tenable. Our experience teaches us that, in bills of exceptions, grounds are not unfrequently set forth so defectively as to put them entirely at the mercy of the opposite counsel, who, nevertheless, from preference to have the points decided, or some other cause, permit them to stand, and, in some cases, permit entire bills of exceptions to stand, which they might dismiss, and invoke the decision of the Court upon the points made, rather than move to dismiss the entire case, or to strike from the record the defective assignments of error. We cannot assume that counsel for defendants in error in the dismissed bill would, had their motion to dismiss the entire case failed, have then moved to strike the assignments of error defectively set forth from the record. Indeed, before we could do so, we must first decide that those assignments are defectively set forth, which would be equivalent to reopening that case, and hearing counsel upon it with their positions reversed. Again, ought not grounds that could have been put in the first bill to have been embraced in it? Is not the case analogous to a motion to continue? The only questions which we can now consider are the two already stated. There is no law applicable to the case, to which the verdict can be contrary to, that is not embraced in some one of the exceptions contained in the first bill of exceptions; and as to those, the plaintiffs in error are estopped by the judgment of dismissal.

2. Is it contrary to evidence? The bill sought to rescind the contract upon the ground of a misrepresentation of a material fact by Perry, one of the defendants, and who

acted as agent of the others, in making the purchase, as to the solvency of the Mahones, whose notes the complainant was induced to take by such misrepresentations. There is no dispute that the representations were made as alleged. Defendants denied that the Mahones were insolvent at the time they were made. The evidence shows that they were then insolvent, however much Perry and the Mahones themselves may have thought otherwise at the time. This misrepresentation, however innocently made, and action on it by the complainant (and he swears he did act on it) constitutes legal fraud: Code, section 3117. This authorized the Court to annul the conveyance: Code, section 3121. And this the verdict does, decreeing a repayment to defendants by complainant of some $1,400 or $1,500, the value of the property received by him in exchange, and that he be reinstated in the possession of the premises sold.

The judgment of the Court is affirmed.

D. H. BURTS, administrator, plaintiff in error, *vs.* JOHN T. LOYD, defendant in error.

(BY TWO JUDGES.)—When the administrator files a bill to marshal assets against creditors, some of whom are proceeding to enforce their claims at law, and seeks to enjoin the common law suits, alleging conflict in the claims, and the Judge grants the injunction, subject to the limitation that "the said several creditors and said administrator go on and litigate the several claims now in process of litigation for the purpose of ascertaining the amounts due said creditors, and for that purpose only, and that as to the priority and dignity of said claims, and as to the rights of said creditors to claim payment out of said funds in the hands of the administrator, that the same be reserved and held up for future determination of this Court, and that the judgment that said creditors may obtain against said administrator shall not create any personal liability as to him, but against the assets of the estate only:" one of said creditors, who is a non-resident, cannot remove his common law suit to the Circuit Court of the United States. Such suit is collateral to the equity cause. 5th March, 1872.

Removal to United States Courts. Before Judge JOHNSON. Chattahoochee county. September Term, 1871.

The bill of exceptions assigns as error the order for removal to the United States Court, under the facts stated in the opinion.

PEABODY & BRANNON; E. H. WORRILL; E. G. RAIFORD, for plaintiff in error.

BLANFORD & THORNTON, for defendant.

MONTGOMERY, Judge.

The administrator, being sued by Loyd and other creditors, filed a bill to marshal assets, alleged insolvency of the estate, and prayed that the common law suits be enjoined. The claims of the creditors were conflicting, and the amounts of the claims disputed by the administrator.

The Chancellor granted a modified injunction, permitting the creditors to go on at common law and obtain their judgments for whatever amounts might be found to be due, but decreeing that the judgments should not bind the administrator personally, or be enforced until the final decree. Upon the passing of this interlocutory order, Loyd filed his petition under what are known as the Garsed Acts of Congress, of 1866 and 1867, for the removal of his common law suit to the Circuit Court of the United States, Loyd being a non-resident, by admission, although that fact does not appear from the record. The Court granted the order to remove, and the administrator excepted. We think the Court erred. The common law suit, with several others, had become merged into the bill. A removal of any one of the suits dissolved the injunction, *ipso facto*, as to that suit: McLeod *vs.* Duncan, 5 McLeod, 342; Bowen *vs.* Kendall, 23 Law Reports, 538. The administrator might have again enjoined in the United States Court, but how could that Court determine the

pro rata to which Loyd might be entitled out of the assets in the hands of the administrator? "A final determination of the controversy, so far as it concerns him," cannot be made in that Court "without the presence of the other defendants as parties in the cause," made by the bill. And the administrator cannot carry them there in any new bill he may find it necessary to file in that Court. Congress certainly could not have intended to so encumber the administration of estates, in all the States, as would be the result of permitting every non-resident creditor of an insolvent estate to have his part of the case made by the administrator's filing a bill to marshal assets removed to the United States Courts. The present case is much stronger against the removal than *Peters vs. Peters*, 41 Georgia, 242.

The judgment of the Court is reversed.

BENJAMIN JOHNSON, plaintiff in error, *vs.* JOHN J. LITTLE *et al.*, defendants in error.

(BY TWO JUDGES.)—Where A sues "as guardian of the minors" of B, on a contract originating before June, 1865, he is entitled to amend his declaration by alleging that the note sued on is the property of C, one of the minors, and that she is still a minor, and if he prove the allegation, it will excuse the filing of the affidavit required by the second section of the Relief Act of 1870. 5th March, 1872.

Amendments. Relief Act of 1870. Minors. Before Judge JOHNSON. Harris Superior Court. October Term, 1871.

The facts are in the opinion.

E. H. WORRILL; J. M. MOBLEY, for plaintiff in error.

B. H. BIGHAM, for defendant.

MONTGOMERY, Judge.

This was a suit brought by the plaintiff in error "as guardian of the minors of Winston Billingslea," on a note payable to himself individually, or bearer, but which he offered to prove belonged to his ward, Ophelia Billingslea. The note was in renewal of a debt contracted before June, 1865. Plaintiff moved to amend his declaration by alleging the above facts. The Court refused the amendment, and refused to permit the proof offered to be made, and on motion of defendant, dismissed the suit for non-payment of taxes.

The amendment should have been allowed. In an action by or against an individual, the pleadings may be amended by inserting his representative character: Code, section 3137. So, where several plaintiffs sue jointly, the declaration may be amended by striking out the name of one or more plaintiffs: Code, section 3430. Here the record shows that plaintiff sued "as guardian of the minors of Winston Billingslea." Had he sued in his individual character he might have inserted the name of his ward, and sued as guardian for her. If all the minors had sued by next friend, the declaration might have been amended by striking out the name of one or more of the plaintiffs.

Under the first section quoted, he could certainly strike out the words "as guardian," etc.; that being done he then, under the same section, might amend by inserting "as guardian for Ophelia Billingslea." The amendment made, and the allegation proved, the case falls under the 14th section of the Relief Act of 1870, and no affidavit of payment of taxes was necessary.

Judgment reversed.

BARBARA DAVIS, plaintiff in error, *vs.* WILLIAM BAGLEY *et al.*, defendants in error.

(BY TWO JUDGES.)—1. When an administrator of an estate pays over to A' one of the distributees and her children, A's distributive share, divding it equally between them, under the misapprehension that the children were entitled to participate in the fund, it is a *devastavit* as to the amount paid to the children.

2. A charge not warranted by the evidence is error.

3. It is too late to move to dismiss a case here, for want of filing of the bill of exceptions, in the Clerk's office below, after the opening argument for plaintiff in error is concluded. (R.) 5th March, 1872.

Administrators and Executors. *Devastavit.* Charge of Court. Practice of Supreme Court. Before Judge JOHNSON. Harris Superior Court. October Term, 1871.

For the facts, see 40 Georgia Reports, 181, and the opinion.

(When the opening argument for plaintiff in error was concluded, defendant's counsel discovered that the bill of exceptions did not appear to have been filed in the office of the Clerk of the Superior Court, and for this, moved to dismiss the case. The Court said the motion came too late.)

D. H. BURTS; PEABODY & BRANNON, for plaintiff in error.

B. A. THORNTON; E. G. RAIFORD, for defendants.

MONTGOMERY, Judge.

The facts of this case are fully set out in the same case, as it is reported in 40 Georgia, 181, except as to the charge of the Court.

Counsel for plaintiff, requested the Court, in the present case to charge the jury, "that the $5,000, paid by Bagley to the children of Mrs. Davis, were assets in his, Bagley's, hands"—which the Court refused to do. We think, under the former decision in the case, the plaintiff was entitled to

the charge. The delivery of the assets to the children was there decided to be a *devastavit*, and if a *devastavit*, the fund was certainly, in contemplation of law, still in the hands of the administrator to be administered.

The Judge charged: "If the jury believe that Bagley reserved in his hands, as administrator of Samuel Jones, an amount sufficient to pay the distributive share of Mrs. Davis, and that the assets in his hands consisted of notes given for the hire of negroes, and sale of negroes, and in Confederate bonds and Confederate money, and that he acted in good faith—then, although he paid to some of the distributees more than he paid to others, yet if the whole estate in his hands had become of no value, *without the fault of Bagley*, by the results of the war and subsequent legislation, then the jury should find for the defendant." This charge, under the former decision in the case, was not warranted by the evidence.

The proof shews that $5,000 had been lost by his fault, and for this amount he was responsible.

Judgment reversed.

R. B. GOODROE, plaintiff in error, *vs.* THOMAS NEAL, defendant in error.

BY TWO JUDGES.)—The Ordinance of 1865, suspending the Statutes of Limitations, was of force, *proprio vigore*, irrespective of any confirmation of it by the Convention of 1868. 5th March, 1872.

Ordinance of 1865. Limitation of Actions. Before Judge JOHNSON. Marion Superior Court. October Term, 1871.

The case is reported in the opinion.

W. B. BUTT; M. H. BLANFORD, for plaintiff in error.

E. M. MILLER; E. H. WORRILL, for defendant.

MONTGOMERY, Judge.

This was an action by defendant in error against plaintiff in error upon two promissory notes, payable December 25, 1859, and December 25, 1860, the suit not having been commenced before July 24, 1869. Defendant pleaded the Statute of Limitations, making the point that the Ordinance of 1865, suspending the Statutes of Limitations, had no force *suo proprio vigore*, and took effect only after the confirming Ordinance of the Convention of 1868 gave it vitality; and that before the latter Ordinance was passed, the statute had fully run; and hence, under the principle laid down in *Calhoun vs. Kellogg*, 41 Georgia Reports, 231, the plaintiff's action was barred.

I know of no reason why the Ordinance of 1865 did not take effect *suo proprio vigore*, which does not apply with much greater force to any ordinance of the Convention of 1868. Hence, no confirmation of an ordinance of the former convention by the latter could possibly give it any greater force than it intrinsically possessed.

Judgment affirmed.

R. BENJAMIN *et al.*, administrators, plaintiffs in error, *vs.* J. M. GILL, administrator *de bonis non*, defendant in error.

(BY TWO JUDGES).—1. Where A, by his will, devised a tract of land to be sold and the proceeds to be divided between B and C, and appointed B his executor, and B proved the will and took out letters, and went into possession of the premises, A having lived thereon at his death, and B afterwards died:

Held, that, in an action of ejectment, brought by the administrator *de bonis non* of A against the widow of B and his administrator, the defendants were estopped from setting up title in B, acquired previously to the death of A. Whether the title is good or bad, the defendants

cannot set up a title adverse to that under which B got possession of the premises.

2. A trustee or executor cannot, after he has accepted the trust, set up a title averse to the trust.

3. Where land is devised to B and C, and the testator, after making his will, conveys the land by deed to B, whom he appoints his executor; and who qualifies as such after the death of testator. *Quere*, whether B it estopped from denying that the land passed by the will.

4. It need not appear when the Court adjourned, if it appear that the bill of exceptions was tendered to the Judge, and certified within thirty days from the beginning of the Court. (R. See end of report.) 5th March, 1872.

Estoppel. Landlord and Tenant. Ademption of Legacies. Before Judge JOHNSON. Marion Superior Court. October Term, 1871.

Gill, as administrator, *de bonis non cum testamento annexo*, of James Perryman, brought ejectment against Mrs. Perryman and E. H. Worrill, as administrators of A. G. Perryman, son of James Perryman.

Plaintiff showed that James Perryman had title to the premises in his lifetime, and that he died in 1864, testate. His will was introduced. It was made in 1854. By it the premises in dispute were devised to his said son and Mrs. Jones, and said son and Jones were nominated as his executors. It was shown that in January, 1865, said son propounded James Perryman's will for probate, had it admitted to record, took the usual oath as executor, and obtained letters of executorship. It was shown that the son, A. G. Perryman, took possession of the premises in 1865, and his widow in 1869. With proof as to mesne profits, plaintiff rested the cause.

Defendant's counsel read in evidence a deed of gift from James Perryman, made in 1856, conveying said premises to said son, A. G. Perryman, but reserving the use and occupation thereof during his life. They offered to prove that from the death of the father, the son, up to the date of his own death, occupied, used and held the premises, claiming

them as his own. This evidence was rejected. The Court charged the jury that A. G. Perryman's representatives were estopped from claiming adversely to said James Perryman's representative if said premises were devised by the will and A. G. Perryman had proven the will and taken an oath to execute it. The jury found for the plaintiff. The rejection of said evidence, and said charge are assigned as error.

(Defendant's counsel moved to dismiss this case because it did not appear when the Court below adjourned. But the motion was overruled, because it appeared that the bill of exceptions was tendered to the Judge and certified within thirty days from the beginning of the Court.)

B. HILL; B. B. HINTON; E. H. WORRILL, for plaintiffs in error. As to estoppel: 1 Jarman on W., 13; 21 Ga. R., 21, 45; 2 Sm. L. Cas., 453, 555; 5 Cush. R., 596, 601; 15 La. An. R., 679; R. Code, section 3700; 23 Ga. R., 520, 526. This was an adeemed legacy: R. Code, section 2427.

M. H. BLANFORD; E. H. MILLER, for defendant.

McCAY, Judge.

1. It seems very plain from the evidence in this case, that the executor of old Mr. Perryman got possession of this land by virtue of his office as executor. His possession was the possession of the estate, and the administrator *de bonis non* cannot be met in an action of ejectment by a claim of title in the executor adverse to the estate. This is a familiar principle, and is fully sustained by the authorities.

2. It is also clear, from principle as well as authority, that a trustee who has accepted the trust, cannot set up title adversely to his *cestui que trust*. It would be contrary to public policy to permit a trustee thus to take advantage of his opportunities to learn the defects in the title of the beneficiaries; and by accepting the trust he has acknowledged that the title is not in himself. We do not think the cases read show

any distinction in the case of an executor from other trustees. Some distinctions have been drawn as to what stage of the proceedings, what time in the history of the executorship, this estoppel commences. But I do not think there is one where he has been fully clothed with the trust, in which he is not held to be bound by his acceptance. Whether this case comes clearly within the rule, we have some doubt.

3. There may be some question, whether this legacy passed under the will at all. Was it not, if this deed be valid, an adeemed legacy? And can the executor be fairly said to claim adversely to the will, when the date of his claim is subsequent to the will? Can he be fairly said to contradict the will, when by the very deed he sets up, he recognizes that at the date of the will the title was in the testator, under and from whom his own title is derived. Our judgment is put solely on the question of possession, and we express no opinion on the other question.

Judgment affirmed.

SPEER & HOOKS, plaintiffs in error, *vs.* SAMUEL G. HART, defendant in error.

BY TWO JUDGES.—1. The Statutory factor's lien covers only the crop. (R.)

2. Where a factor makes an affidavit that a planter is indebted to him for money loaned to purchase supplies to make a crop, to secure the payment of which, and costs, and counsel fees, such planter gave a draft for the money, containing a lien on his crop and stock of all kinds, in which lien it did not appear that the money was to be used to purchase said supplies, and which affidavit was made to foreclose said lien, under section 1977, of the Revised Code, before a Judge of the Superior Court of a different circuit from that in which the property was situated:

Held, That the lien is not such an one as can be foreclosed in the manner pointed out by section 1977 of the Code.

2. If it was, the affidavit was not made before an officer authorized to foreclose the lien under that section. (Query?) 5th March, 1872.

Factor's liens. Before Judge JOHNSON. Marion Superior Court. October Term, 1871.

The facts are in the opinion.

HAWKINS & GUERRY, by REPORTER, for plaintiffs in error. As to factor's liens: Acts of 1866, page 141; R. Code, section 1977. Construction of Statutes, etc.: R. Code, sec. 4, cls. 6, 9; 3 Kelly, 31.

HINTON & SON; E. H. WORRILL, for defendant.

MONTGOMERY, Judge.

This was an affidavit, made before Judge James M. Clark, of the South Western Circuit, to foreclose a factor's lien on the crop and stock of the defendant, grown in Marion county, of the Chattahoochee Circuit.

It appears, from the affidavit, that the money was loaned by the plaintiffs to the defendant "for the purpose of furnishing supplies to enable him to make his crops for the present year." Whether the money was ever so used or not, does not appear. It further appears, from the same source, that defendant "gave to Speers & Hooks his draft for the payment of said sum, dated 2d May, 1870, in which, in order to secure the payment of said sum, costs and counsel fees, he gave them in writing a lien on his cotton and corn crops, growing, the present year, on his plantation, in Marion county, and a lien also on his stock of all kinds." No copy of the draft containing the lien accompanies the record. Hence, the Court is compelled to look to the affidavit alone, for the provisions creating the lien. These are all of the material statements of the affidavit. It nowhere appears that the money was expended either for *provisions* or *commercial manures*, or, indeed, for any supplies. Nor does it appear, in the lien, that the money was to be so used, so far as we can gather from the affidavit. The affidavit is made to obtain

execution, not only against the crop, but against the "stock of all kinds," and for counsel fees, amounting to $97.28, as well as the sum loaned. The execution follows the affidavit; and the sheriff' levies upon ten bushels of corn, about twelve thousand pounds of seed cotton, and over four hundred bushels of cotton seed, besides nine horses and mules, one yoke of oxen, and several cattle. The debt, besides counsel fees, was for about $2000.

1. Section 1977 of the Code only gives a lien to factors *upon the growing crops* of farmers "for *provisions* and commercial manures furnished;" and provides a mode of enforcement, to-wit, as steamboat liens are enforced, under section 1969. And it is under *this* law that this lien is attempted to be enforced. It would hardly be seriously contended that the foreclosure, execution and levy, so for as the *stock* is concerned, is regular. However good the lien given may be as a mortgage (and we have no means of ascertaining, for we have it not before us), the sections quoted do not provide for so foreclosing a mortgage upon personalty.

2. As to the crop, if provisions or manures had been furnished, the lien would have been good. The money was loaned "for the purpose of furnishing *supplies* to enable him to make his crops." What kind of supplies? Mules, wagons, ploughs, etc., are as much supplies to make a crop as are provisions. But suppose supplies mean provisions—were they ever bought with the money? The affidavit does not so state; nor does it mention that the draft, which seems to have been a reduction of the agreement of the parties to writing, even stated that the money was borrowed, or intended to be used for that purpose. The only knowledge we have upon the subject is, that the affidavit says the money was loaned for the purpose, and that afterwards, or about the time some agreement, in writing, in the shape of a draft, was entered into, of the terms of which we are not very clearly informed, or that it even intended to create a factor's

lien. As this is a summary proceeding, everything required by the Act to be done must appear to have been done; nor can its provisions be extended to purposes other than those mentioned in the Act.

3. During the argument of this case, the attention of the Court was not drawn to the Act of September 16, 1870, amendatory of section 1969 of the Code. Hence, the decision, from the bench, that the affidavit was not made before an officer authorized to foreclose the lien, under that section. It is, however, questionable whether, even under that section, the affidavit can be made before any Judge of the Superior Court in the State. It is unnecessary to discuss the question now. It may be considered still open. If the lien was a mortgage of personalty, as it was, if it was anything, as to the stock, clearly it was not foreclosed before the proper officer, unless Hart lives in Judge Clark's circuit, and the usual order was passed, which cannot be so, as the affidavit is filed in the office of the Clerk of the Superior Court of Marion county, and he issues the execution: Code, section 3895.

Judgment affirmed.

H. L. McGehee *et al.*, plaintiffs in error, *vs.* James Taylor, defendant in error.

(By two judges.)—The verdict of a jury must be very strongly against the weight of evidence, to justify this Court in reversing the refusal of the Court below, to grant a new trial. 5th March, 1872.

New trial. Before Judge Johnson. Marion Superior Court. October Term, 1871.

For the facts see the opinion.

Blanford & Crawford, for plaintiffs in error.

THORNTON & SPENCER; E. H. WORRILL, for defendants.

MONTGOMERY, Judge.

This was an action of trespass *vi et armis* by the defendant in error, against the plaintiffs in error, for blacking the face of the former The jury found a verdict in favor of plaintiff, for $500. A new trial was moved for, on the ground that the verdict was contrary to the evidence, and other grounds, but the one named is the only one insisted on here. The Court below overruled the motion, and plaintiffs in error excepted. We think the verdict is sufficiently sustained by the evidence.

Judgment affirmed.

THOMAS J. WOOLFOLK *et al.*, plaintiffs in error, *vs.* DANIEL F. GUNN, defendant in error.

(BY TWO JUDGES)—1. The bankruptcy of the defendant is no reason why the Superior Court of this State should not hear and decide upon a motion to correct its minutes and make them speak the truth by entering *nunc pro tunc* upon its minutes, the verdict of the jury rendered years previously in a suit against the bankrupt.

2. When, after a judgment had been signed, and execution issued and several years had elapsed, a motion was made to put upon the minutes of the Superior Court the verdict of the jury in the case, which did not appear on the minutes, and it appeared that there was a verdict in writing, signed by the foreman of the jury of the proper term, and an entry upon the Judge's docket, in his own hand, of "verdict" in the case:

Held. That the question was one to be tried by the record; that no jury was required, unless affirmative issues of fraud were tendered.

Held also, That there was sufficient in the record to authorize the amendment.

3. *Held also,* That in granting the amendment the order should be so framed as that it should work no harm to any defenses to the judgment which any of the parties to the motion might have, growing out of the failure of the plaintiff to have his verdict entered at the proper time. 12th March, 1872.

Amendment. Practice. Bankruptcy. Tried before Judge COLE. Bibb Superior Court. April Term, 1871.

This was a motion by Thomas J. Woolfolk, James H. Woolfolk and John W. Woolfolk, security, to set aside a judgment obtained in said Court, at May Term, 1869, in favor of Daniel F. Gunn, guardian, etc., against them and the *fi. fa.* issued thereon, on the grounds that said judgment and *fi. fa.* were not founded on any legal verdict or other legal authority, and also, that said judgment and *fi. fa.* were not on the minutes or records of this Court.

At the same time and before said motion, a motion was made by the plaintiff, in said judgment and *fi. fa.*, to enter the verdict rendered by a jury of said Court at the May Term, 1869 thereof, and on which said judgment was founded on the minutes of said Court *nunc pro tunc*. The motion to enter the verdict *nunc pro tunc* on the minutes was first taken and the first in order, there being no verdict on the minutes in said case. To this motion the said defendants, Woolfolks, made the following objections, and asked that the issues they presented be submitted to a jury for trial, to-wit:

No verdict was ever rendered in said case; the entry on the declaration, purporting to be a verdict, was in fact not a verdict of any jury of said Court duly rendered in said case.

Defendants further objected to the granting said motion, because the said James H. Wolfolk has been duly declared a bankrupt in the District Court of the United States, for the Southern District of Georgia, and proceedings are now pending in bankruptcy in said Court against him, and they claim that no judgment or order can be taken in this Court affecting him while said proceedings are pending in said Bankrupt Court. Between the term of the Court at which a verdict in said case is alleged to have been rendered, and the application to enter the same on the minutes *nunc pro tunc*, innocent third parties, to-wit: I. C. Plant & Son, and others, have obtained *bona fide* liens on the property of these depo-

nents, and innocent parties have become *bona fide* creditors of these deponents, on the faith of said property, and their rights may be injuriously affected by said *nunc pro tunc* order.

Said Court refused to allow said objections to be submitted to a jury on the issues made therein, on the ground that as it was all of record in the Court, the Court only could decide it, and, as the papers of the Court show a verdict at the term to which it was returned, he allowed the verdict to be entered *nunc pro tunc*. Said motion and the said objections thereto being heard together, it was shown to the Court that there was no verdict in said case on the minutes of said Court, and the declaration (original and second originals) with the entries thereon and said verdict and judgment and *fi. fa.* were exhibited and read to the Court, also one entry of verdict from the Bench Docket, May Term, 1869, opposite said case in the handwriting of the Judge.

The Court, after argument, ordered and adjudged that said motion to set aside said judgment and *fi. fa.* be refused, and granted said motion to enter what purported by an entry on said declaration to be a verdict rendered in said case on the minutes of said Court *nunc pro tunc*, to which several rulings and judgments the said defendants to said judgment and *fi. fa.* then and there excepted.

WHITTLE & GUSTIN; SAM. HALL; LANIER & ANDERSON, for plaintiffs in error. Judgment can be entered only upon a verdict: R. Code, sec. 3510; 40 Ga. R., 56. The presumption is that, if what purported to be a verdict was one, it would appear on the minutes: R. Code, sec. 3700. What makes a good verdict: Bouv. L. Dic., 622; 10 Bac. Abridg., 306. The Judge's entry on the docket was but a *memorandum:* 4 Ga. R., 157. Whether there was a verdict was a collateral issue for a jury: R. Code, sec. 3555. Bankruptcy ousted jurisdiction of State Court: Bankrupt Act 1867, sec. 21. Sections 3444 and 3449 do not cover this case. *Bona*

fide creditors, etc., bound by record only: 40 Ga. R., 56; 18th, 287. As to surety's risk being increased: R. Code, sec. 2126; 37 Ga. R., 428.

JAMESON & NESBIT and B. & W. B. HILL, by THE REPORTER, for defendant. A finding, when delivered into Court, is a verdict without record: 6 Ga. R., 458; 7th, 191; 3d, 18; 1st, 559; 16th, 194; 38th, 444. Order, *nunc pro tunc*, was proper: R. Code, secs. 3449, 194; 13 Ga. R., 223. Bankruptcy not in the way: Bump. on Bankruptcy, 194, 344; 42 Ga. R., 192, 518. We ask damages for delay: R. Code, sec. 4221.

McCAY, Judge.

1. The Court where a judgment is rendered is the proper, and, indeed, the only Court where a motion can be made to amend it. The fact that the defendant is a bankrupt, that proceedings are either pending, or have been concluded in the Federal Court, to have him declared a bankrupt does not, as it seems to us, have anything to do with the motion. It may be that the judgment is a lien on certain property, and may have, for that reason, a preference in the Bankrupt Court, or that it has a lien on property sold by the defendant; or, as in the case here, there may be parties to the judgment who are not relieved by the principal defendant's bankruptcy. In either of these cases, the Court of the State may find it to be its duty to amend the judgment, to make it conform to the truth of the case. Hardly any limit can be put to the power of a Court to amend its own records so as to make it tell the truth, as to what actually transpired. The power is stated generally, and without limitation in the Code, sections 194, 3448, 3449, 3456; and, in the nature of the case, this must be so. The truth ought always to be in the records. They are said to import verity, and cannot be gainsaid, and Courts ought, therefore, to be vigilant to see to it that they are true. As between the parties, we see no reason to fix a limit as to

time, except on the principle applied in equity to stale demands.

2. There was plenty of record evidence to satisfy the Judge. The entry on the original writ, signed by the foreman, and the entry by the Judge, in his own hand, on his Bench Docket, was sufficient. These are not, perhaps, technically, records, but they are in the nature of records. It is said they might have been forged. True, and if *such* an issue had been tendered, a jury would have been necessary. As it is, the Judge was the proper person to ascertain what his minutes ought to speak.

3. Much of what was put in these pleas was not matter to be heard. Parties not before the Court had no interest, and would not be bound by the judgment. But there were parties before the Court, whose rights might be affected by this amendment, if allowed. The securities to the debt, if damaged by this failure to have the verdict entered, have a right to take advantage of the failure, and we think, as the point was distinctly made, the amendment ought to be qualified so as not to affect any right of the surety. When the execution is proposed to be used against him, he may wish to insist that he has been damaged by this failure to have the verdict entered. That it ought to be entered is, to us, very clear. The truth of a case ought always to appear on the record. What effect the failure to see to it, at the time, that the record was true, shall have on the plaintiff's rights against the security and purchasers, is another question, that cannot be made until the record is perfected.

Judgment affirmed, as qualified.

ROSA E. DELONY, plaintiff in error, *vs* JOHN P. FORT, administrator, defendant in error.

(BY TWO JUDGES.)—1. A widow need not make the affidavit of payment of taxes required by the Act of October 13, 1870.

2. Where a judgment has been obtained since the adoption of the Constitution of 1868, the Court will presume that if the contract on which it is founded was for the purchase of slaves, or for the hire thereof, it would have been pleaded and proved on the trial at which the judgment was obtained. 12th March, 1872.

Slave debts. Presumptions. Relief act of 1870. Widows. Before Judge COLE. Bibb Superior Court. May Term, 1871.

For the facts necessary see the opinion.

NISBETTS & JACKSON, for plaintiff in error.

WHITTLE & GUSTIN, for defendant.

MONTGOMERY, Judge.

The plaintiff, a widow, obtained judgment in February 1870, against the defendant on an indebtment of the intestate created before June, 1865.

An affidavit of illegality was filed to the execution issued on plaintiffs judgment on several grounds. It is only necessary to notice two—first, that the consideration of the debt, or of a great part ot it, was slaves; second, that no affidavit of judgment of taxes had been filed. A motion was made to dismiss the affidavit of illegality, which was overruled. The judgment estops the defendant from making any defense which was within his knowledge, and in his power to make the suit, before judgment, not amounting to an independent set-off, or a purely equitable defense. Nor is a widow obliged to file an affidavit of payment of taxes: Relief Act of 1870, section 14.

Judgment reversed.

WEEMS & COWLES, plaintiffs in error, *vs.* NUSSBAUM & DANNENBURG, defendants.

(BY TWO JUDGES.)—In a suit on a *quantum meruit* for professional services, when there is conflicting evidence as to the amount and efficiency of the services, this Court will only in a very extreme case, reverse the judgment of the Judge refusing a new trial. The jury in such cases are, by law, the proper tribunal to estimate the services, and the Court ought only to interfere in extreme cases, so as that verdict is illegal. 12th March, 1872.

New trial. Before Judge COLE. Bibb Superior Court. May Term, 1871.

Weems & Cowles, as attorneys, sued Nussbaum & Dannenburg for $1,000, as the value of their services as their attorney, in procuring a settlement of a certain case. The evidence was conflicting as to every fact, except that the claim was settled at a saving of $4,900 out of $6,000, claimed from defendants. Plaintiffs claimed that they brought about the settlement and were employed by defendants. Defendants denied employing them in that case, and said they brought about the settlement themselves. No services were shown to have been rendered by Weems & Cowles, except consultations and the filing of pleas which they claimed would defeat the action. The evidence as to the value of their services was variant. The jury found for them $50 and costs. A new trial was moved for upon the grounds that the verdict was contrary to law, etc. The Court refused a new trial and that is assigned as error.

A. O. BACON, by J. R. JACKSON, for plaintiffs in error.

POE, HALL & POE, for defendants.

McCAY, Judge.

This case comes clearly within the rule so often laid down by this Court. Here was a suit for the value of services, a

quantum meruit. Even the *evidence* is matter of opinion to a large extent; and this is true, both as to the value of the services in money, as well as to how far the plaintiffs' services affected the settlement. There is also conflicting testimony as to what the contract was. Knowing, as we do, some of the parties, we may have our own views of the proper credit to be given to the statements of each. But we are not a jury, and it is no part of our duty, or is it in the scope of our authority to do this.

We do not think the Judge erred as matter of law, in refusing a new trial.

Judgment affirmed.

B. B. LEWIS, plaintiff in error, *vs.* R. C. DANIEL, defendant in error.

1. It is in the discretion of the Judge of the Superior Court to consolidate two cases sued in that Court, into one, on the motion of defendant. Such discretion will not be interfered with unless abused.
2. This Court can review a decision as to the consolidation of cases, though the cases be pending below. (R.)

Consolidation of cases. Before Judge COLE. Bibb Superior Court. May Term, 1871.

A more extended statement of the facts than is contained in the opinion is unnecessary. A motion to dismiss this writ of error because the cases were still pending below, was overruled.

WHITTLE & GUSTIN, for plaintiff in error. Defendants should not have to pay double costs: Code, section 3196 says cases "may" be consolidated. "May" means "shall:" Potters' Dwarris on Statutes, 221, 223; Saunders' Report, 58. The defense to both cases was the same as averred, and the motion was demurred to: 13 Ga. R., 201.

LANIER & ANDERSON, for defendant.

MONTGOMERY, Judge.

This was a motion, by plaintiff in error, to consolidate two cases, brought against him by defendant in error. The one case was a suit on an agreement between them, as partners, whereby plaintiff in error bound himself, in certain contingencies, to refund money to defendant in error. The contingencies happened, and suit was brought. The other was a suit on a note, given by plaintiff in error to the defendant in error, *and for some* $300 *of rent*, collected by plaintiff in error for defendant in error. The petition was to consolidate the two cases, because "said two papers sued on, in said two writs and suits, grew out of, and were hurriedly given finally to wind up and close said partnership." The petition states "that the amount he (petitioner) justly owes said Daniels, if any at all, which he does not admit, is several thousand dollars less than the sums called for in said papers," etc.; that the entries in the partnership-books, alleged to be in the hands of Daniels, and which he prays may be brought into Court, "will greatly reduce and diminish the amount of said two papers," etc. Nothing is said about the item of $300 rent, alleged to have been received by petitioner. The Court below refused to consolidate. Whether because defendant failed to "make it satisfactorily appear to the Court that the defense to *all* the demands was the same" or not, the record does not inform us. Certainly, it is not made to appear that the defense to the rent claim is the same with that relied on against the claims growing out of the partnership transaction. But we are not inclined to interfere with the discretion of the Judge of the Superior Court, in refusing to consolidate cases, unless there is a very plain case of abuse, to the detriment of the defendant.

Judgment affirmed.

HOUSER & BRONSON, plaintiffs in error, *vs.* O. B. RILEY, administrator, defendant in error.

(BY TWO JUDGES.)—When money was collected by one of a firm for a third person, and, with the full knowledge of the partners, was applied to the use of the firm, they are liable, as partners, to the owner of the money for the debt, nor does it change the rule that one of the partners, other than the one collecting the money, considered the money advanced to the firm as part of the proportion of the partner collecting the money. 12th March, 1872.

Partnership. Before Judge COLE. Houston Superior Court. May adjourned Term, 1870.

This was assumpsit, by Riley as administrator of Riley, against Houser and Bronson for money had and received. Houser testified that he and Bronson were needing money, and trying to borrow it, and that he had some money which he had collected as agent for Riley, deceased, and put it into the firm business, placing it to the "credit of the firm, upon its books." He said Bronson knew not how he got the money, at the time, but, upon being subsequently informed, expressed himself satisfied with the matter. Bronson testified that he had put $3,000 into the firm business, and Houser had put nothing in; and he supposed that this was a payment into the firm, by Houser, for his own credit. The firm knew that the money was Riley's and afterwards used it. Defendant's counsel requested the Court to charge the jury as follows: "If the money alleged to have been lost by plaintiff's intestate was, in fact, lent on the credit of the individual member of the firm, although it be actually used and applied to the partnership purposes, the firm is not bound; it will be considered an advance, by the individual, for the benefit of the firm, and he will become the creditor of the firm.

The Court refused so to charge, but charged as follows: "If the money was, in fact, applied to the partnership uses, and for the benefit of the partnership, with the knowledge

and consent of both partners, the partnership is liable, whether the credit was given to the partnership or to one of the members of the firm."

The jury found for plaintiff. A new trial was asked, upon the grounds that the Court erred in charging as he did, and in refusing to charge as requested, and because the verdict was wrong. The Court refused a new trial, and error was assigned upon those grounds.

KILLEN & MARTIN; POE, HALL & POE, for plaintiffs in error.

DUNCAN & MILLER, for defendant, cited 8 Ga. R., 493.

McCAY, Judge.

To have given the charge asked for would have been assuming that this money was loaned to one of the firm, of which there was no evidence. The party collecting the money testified that, having it in hand, as the agent of Riley, he loaned it to the firm, and there are two witnesses who testify that this money was used by the firm, knowing it was Riley's money. Indeed, all parties admit that this was Riley's money, and that it went to the use of the firm. Parties are bound to take notice of the ownership of property, if they are informed of the truth, and it is admitted here that, when the fact came to their knowledge that this was Riley's money, all these parties ratified and approved of the appropriation of it to the use of the firm.

The testimony of William Bronson is, that this money was placed to the credit of the firm, not to his individual credit. Had it been an advance of his own, it must have gone on the books in that way. These books were open to inspection, and it is clear that all parties knew the exact truth of the case. We see, therefore, no error in the Judge's charge, nor in finding of the jury.

Judgment affirmed.

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JACOB RYAN, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

(BY TWO JUDGES.)—1. Where A advances $20 to a laborer on a promise of the latter to work it out, and the laborer afterwards refuses to do so, he is not guilty of the offense of being a common cheat and swindler.
2. It is not encumbent upon the District Attorney to follow cases from that Court into the Supreme Court. (R. See end of Report.) 12th March, 1872.

Criminal law. Practice. Before Judge COLE. Chambers. Twiggs county, 1870.

Ryan was convicted in the District Court of being a common cheat and swindler. The evidence was that Ryan had borrowed $20 upon his promise to return to the lender's place and work to repay the money, and then refused to comply with his promise or repay the money. Ryan's counsel sued out *certiorari* before Judge Cole, who held that the conviction, under the facts, was right. That is assigned as error.

(When the case was called here the District Attorney was not present. An attorney stated that he had requested *him* to appear in the case if it was his duty to appear here. This Court said it was not his duty. And so there was no appearance for the State.)

J. D. JONES, by B. H. HILL, Jr., for plaintiff in error. What is a cheat and swindler? R. Code, sec. 4507. A promise is not a pretence: 2 Bish. Cr. L., 400, 401; 1 Den. C. C., 563; 2 Moody C. C., 254; 2 Rob. (N. Y.) R., 500.

No appearance for the State.

MONTGOMERY, Judge.

The plaintiff in error in this case, represented to the prosecutor, that if he would let him have $20 he would come and work it out with him. The prosecutor let him have the money, and prisoner refused to comply with his

contract, whereupon prosecutor indicted him for being a common cheat and swindler.

"A pretence that a party would do an act which he did not mean to do, (as a pretence that he would pay for goods on delivery) was holden not to be a false pretence:" 2d Russell on Crimes, (5th Am. Ed.) 289. The present case comes within the principle quoted.

Judgment reversed.

ROWLAND & TOBIASON, plaintiffs in error, *vs.* MATTHEW DAILY, defendant in error.

(BY TWO JUDGES.)—1. Under the Act of 1865 and 1866 (R. Code, sec. 3917), a lost note may be established before the Superior Court. (R.)

2. The Act of 1865 and 1866, providing for the summary establishment of promissory notes, requires the party seeking to establish the same, to swear that he is the owner, or the agent or the representative of the owner of the same, and if the affidavit is defective in this respect the proceeding is null. 12th March, 1872.

Lost note. Before Judge Cole. Bibb Superior Court. November Term, 1871.

Said firm sued Daily upon a lost promissory note. Their counsel tendered in evidence a copy. To it was appended an affidavit before a Commissioner of Georgia, in New York, by Rowland, that said copy "is a copy, in substance, of a certain promissory note given by Matthew Daily to said firm of Rowland & Tobiason, which said note is wholly due and unpaid. Deponent has not said note in his possession, but verily believes that the same was lost, whilst the property of said Rowland & Tobiason." There was also a notice therein to Daily, that on a day named they would move the Superior Court to establish said lost paper, which notice had been duly served. It also appeared that Daily filed no objection to the proceeding, and that the said Court ordered said copy estab-

lished in lieu of the lost original. These papers tendered together were objected to upon the ground that the affidavit did not conform to the statute and were ruled out. This is assigned as error.

POE & HALL, for plaintiffs in error. The establishment of the copy concluded defendant: 16 Ga. R., 487; 20th, 90; 22d, 60. The Superior Court had jurisdiction: Pr. Dig., 420; 36 Ga. R., 212, 219. The affidavit complied with the statute: R. Code, sec. 3917.

LANIER & ANDERSON, for defendant.

McCAY, Judge.

1. The Act of 1865 and 1866, providing for the summary establishment of promissory notes is very badly drawn; indeed, it is difficult to understand some of its language at all. We see no good reason, however, to confine the persons, before whom the plaintiff may go, to Justices of the Peace. The Superior Court is surely a proper tribunal before which to take the proceedings required.

2. But the Act is positive that the party must make oath that he is the owner, or the agent of the owner of the paper. This the affidavit, in the present case, fails to do. The proceeding is a summary and rather an extraordinary one, and we think it ought to be fully complied with. The ownership of the paper is an important fact in such a proceeding, and the maker has a right to know that the person who is endeavoring to establish the paper, is the proper person to do it.

For this reason we affirm the judgment. The affidavit is defective.

Judgment affirmed.

JOHN B. LEWIS, plaintiff in error, *vs.* J. R. ARMSTRONG, administratrix, *et al.*, defendants in error.

(BY TWO JUDGES.)—1. Where a judgment has been obtained since the adoption of the Constitution of 1868, it cannot be attacked by affidavit of illegality to the execution issued thereon, on the ground that the consideration of the contract on which the judgment is founded was a slave. Such defense should have been made to the action.

2. When judgment was obtained at common law against the makers and indorser of a note, and an appeal entered, which was afterwards dismissed, and subsequently the indorser is again sued on the note and permits a judgment to be taken against him by default, he cannot, by affidavit of illegality, attack such second judgment on the ground that a prior judgment unreversed existed against him for the same debt. He should have made this defense to the second action. 12th March, 1871.

Slave debts. Illegality. Before Judge COLE. Dooly Superior Court. October Term, 1871.

On the 20th of October, 1868, James M. Armstrong obtained a judgment against Lewis upon two promissory notes made in 1860. When the *fi. fa.* was issued and levied upon Lewis' property he made oath that it was proceeding against him illegally, upon the following grounds: 1st. It is founded upon a contract, the consideration of which was slaves, and, therefore, the judgment was void under the Constitution of 1868, which forbade the Courts to give judgments on slave debts. Second. Because when this judgment was entered against him, plaintiff already had another valid and subsisting judgment against him for the same demand. The The other grounds are not material. Armstrong being dead, his representatives were made parties. And they demurred to said affidavit of illegality. The Court sustained the demurrer. That is assigned as error.

S. ROGERS; POE, HALL & POE, for plaintiff in error. If the Court have no jurisdiction, its judgment may be attacked whenever it is sought to enforce it: Revised Code, secs. 3776,

3535, 3536; Cooly's Con. Lim., 397, 399; 14 How. R., 334; 11th, 460; 9th, 350; 24th, 203; Cowp. R., 640. The first judgment was a bar to the second: 11 East. R., 118; Revised Code, section 2674. They asked to review Miller *vs.* Albritton, decided last term.

JOSEPH ARMSTRONG, for defendants, cited Revised Code, section 3621; 40 Ga. R., 506; 43d, 273; 41st, 274; 44th, 347; 7th, 204; 8th, 146; 22d, 570; 26th, 141; 11th, 137; 8th, 317.

MONTGOMERY, Judge.

There are two grounds of illegality insisted on by plaintiff in error in this case—first, that the consideration of the debt on which the judgment is founded, was slaves. This defense comes too late; if good, it should have been pleaded to the action. Secondly, that a former judgment had been obtained against the defendant in *fi. fa.* for the same debt, and that this was the second judgment for the same amount. This stands in the same position with the first ground. See 40 Ga. R., 493, 500; *Miller vs. Albritton*, July Term, 1871.

Judgment affirmed.

JOSEPH FORBES, plaintiff in error, *vs.* THOMAS J. OWENS, defendant in error.

(BY TWO JUDGES.)—The District Court was not, by the Act of October 28, 1870, clothed with jurisdiction to try and give judgment upon debts and contracts not exceeding $100. 12th March, 1872.

Jurisdiction of District Courts. Before Judge STROZIER. Dooly Superior Court. September Term, 1871.

Forbes sued Owens, upon an open account, for $93, before the Judge of the District Court, and Owens obtained a judg-

ment for costs, upon a trial upon the merits. Forbes sued out *certiorari* to correct various alleged errors committed by said district Judges. Judge Strozier refused to sanction the writ, because the District Court had no jurisdiction over the cause of action. That is assigned as error.

J. L. TOOLE; S. ROGERS, for plaintiff in error.

POE, HALL & POE; S. R. GOODE, for defendant. The District Court had not jurisdiction over the cause: Const., Art. V., sec. 4, p. 6; Act 1870, sec. 6, pamph. 33. Nothing is here taken by intendment: 13 Ga. R., 7; 8 How. R., 441, 495. The 17th section of Act of 1870 gives district Judge powers distinct from District Court: Sedgwick on Stat., 422, 423; Dwarris on Stat., 656; 4 Coke, 46 (*a*); 10 Ga. R., 429.

McCAY, Judge.

We have looked carefully into the Act of October 28th, 1870, to find any clause from which to derive the jurisdiction of the District Court over a claim of the character described in this record.

It is true that section 12 of the Act provides that all civil cases, at the monthly sessions, shall be tried by the Judge, without the intervention of a jury, but this confers no jurisdiction. It only provides how the jurisdiction it has shall be exercised. Section 6 authorizes the Judge, at the monthly sessions, to hear applications for eviction of trespassers, intruders and tenants holding over, writs for partition of personal property, possessory-warrants and distress-warrants, and *habeas corpus* cases. These are civil cases, and supply a jurisdiction for section 12 to operate upon.

Section 17 adds additional jurisdiction to hear and determine bail process, (what this may mean is doubtful; perhaps to fix bail in a trover case, or in an action for damages,) issue attachments, evidently returnable to some other Court, since he is not authorized to try attachments and issue warrants for

the enforcement of liens, but, still, not to try them; but this is all. We think, therefore, Judge Strozier was right, and affirm the judgment.

Judgment affirmed.

C. L. REDWINE, plaintiff in error, *vs.* JAMES GLOVER, executor, defendant in error.

(BY TWO JUDGES.)—1. Redwine and his wife obtained a decree, in 1859, against Shrine, as administrator upon the estate of the wife's father, for $6,500, and that certain negroes of the estate be sold, and one half the proceeds of such sale be paid over to the complainants, which decree was afterwards satisfied, and so entered on the minutes by payment of $10,200 by Shrine, but for which sum he really gave his two notes, payable to Redwine, one of which he paid, and the other was sued to judgment by Redwine, in 1862. Such note so sued to judgment, was not given for a negro consideration, and an injunction granted against the levying of the execution founded on such judgment, on the ground that it was based on a contract, the consideration of which was slaves, should have been dissolved.

2. On a writ of error, to the judgment of the Judge of the Superior Court under the Act of October 29th, 1870, this Court cannot review a decision overruling a demurrer to a bill. 12th March, 1872.

Slave debts. Novation. Writ of error. Before Judge COLE. Twiggs Superior Court. October Adjourned Term, 1871.

Glover, as administrator of Shrine, filed a bill containing the following averments: In October, 1868, Shrine died testate, having nominated him his executor. Glover qualified as his executor, and in December, 1868, as required by the will, sold Shrine's personal property to pay his debts, etc. Shrine owned eight-ninths of $10,000 worth of specified land. He bequeathed five hundred acres of it to Mrs. Bostmen. The balance Glover intended to sell, but for the reasons hereinafter stated.

When Shrine died he owed but little, except a judgment against him by Redwine, obtained in October, 1862, for $5,546 25, principal, $254, interest, etc. Redwine has caused the *fi. fa.*, founded upon said judgment, to be levied upon all of said land and is proceeding to sell the same. The widow of Shrine, for reasons stated, is entitled to one-ninth of said land, and a sale of the whole will embarrass a setlement with her.

The sale under Redwine's *fi. fa.* will occur in March, and, therefore, the land cannot be rented for this year, and the estate will thereby lose a year's rent.

The legatees say that Redwine's judgment is founded upon a debt, the consideration of which is slaves and their hire, and have notified Glover not to pay it because such debts cannot be enforced under the Constitution of 1868, and he believes that the facts are as the legatees claim. He prayed that Redwine's *fi. fa.* be enjoined. The Chancellor ordered Redwine to show cause why the injunction should not be granted.

Redwine answered that his was the only judgment against Shrine, and that it was obtained before Shrine married the said widow. He denied that any part of the consideration of the debt upon which his judgment was founded, was the price or hire of slaves, but said it was founded upon a note taken in satisfaction of a judgment which he held against Shrine. Glover amended his bill by averring as follows: In 1859, Redwine and his wife obtained a judgment against Shrine for $6,500 in money, and for the re-sale of five slaves; Shrine to have one-half of the proceeds of the slaves and they the other half. In 1860, Shrine purchased of Redwine his interest in said slaves at $5,000, and allowed Redwine $1,000 for his interest in their hire since the decree, and for this interest in slaves gave the note upon which said judgment is bottomed. Shrine was administrator of Glover, Redwine's father-in-law, and had bought said slaves at his own sale and held them twenty years, and Redwine got said decree to make him account for said slaves and their hire. Shrine paid all

the money decree and gave Redwine his note for his interest in the slaves. Redwine when he took said note gave Shrine the following receipt: "Rec'd of Dan'l W. Shrine, $10,200 which is received as payment and satisfaction in full of the decree in the above case, including the principal and interest of the money portion, and also half of the value and hire for one year (since the verdict) of the negroes decreed to be sold, the value being agreed on between the parties, and the decree for the sale of the negroes being waived. This is, therefore in full satisfaction of said decree."

Meanwhile, Glover had sold the property and had the proceeds in hand.

Redwine's counsel demurred to the bill for want of equity, because the remedy at law was complete, and because it appeared that said debt was not for slaves but in satisfaction of said decree. He asked that the injunction be dissolved, the bill be dismissed, and that Glover be ordered to pay his judgment. The Chancellor refused to do either, and this refusal is assigned as error.

B. H. HILL, for plaintiff in error. No jury was needed, as the question of what was the consideration of the debt was one of law under the facts admitted: 40 Ga. R., 193, 423, 487.

B. HILL; S. HALL; A. W. HAMMOND & SON, for defendant.

MONTGOMERY, Judge.

1. The only question before this Court, in a shape to be passed upon, in this case, is whether, under the facts, as they appear in the record, the consideration of the note on which the judgment of Redwine was founded, was slaves, or the hire thereof. The title of the slaves ordered to be sold, under the decree of 1859, never was in Redwine or his wife. They were only entitled to a distributive share of an estate,

in the hands of Shrine, as administrator, after he had duly administered it. The decree of 1859 ordered him to pay over so much as was ripe for distribution, and to proceed to administer and pay over the proceeds of the remainder. In satisfaction, in full, of this decree against him as administrator, he gave his two notes, for about $5,000 each, in his individual character, one of which is the foundation of the judgment enjoined, and received in return an entry of satisfaction, in full, of said decree on the minutes of the Court which rendered it; Redwine thus waiving not only his judgment, but abandoning all recourse upon Shrine's sureties. If we were of opinion, which we are not, that the foundation of the original decree was a debt, the consideration of which was a slave or slaves, or the hire thereof, there is such new consideration introduced here as to amount to a novation. We, therefore, think the injunction should have been dissolved.

2. The Act of October 29th, 1870, entitled "an Act to prescribe the practice in cases of injunctions, and other extraordinary remedies in equity, and the manner of taking judgments on the same to the Supreme Court," clearly confines this Court, in all cases coming before it under that Act, to a review of the judgment of the Court below, granting or refusing the injunction, or other extraordinary remedy sought by the bill. The overruling of a demurrer cannot, therefore, be brought before this Court, under the practice prescribed by that Act for bringing the judgments therein mentioned to the Supreme Court for correction.

The judgment of the Court below, refusing to dissolve the injunction, is reversed. The judgment overruling the demurrer is not passed upon.

JOSEPH O. DAVIS, plaintiff in error, *vs.* HENRY BANKS *et al.*, defendants in error.

(BY TWO JUDGES.)—1. Where A, a merchant, is indebted to B and C, and sells his goods to B for more than his indebtedness to him, and while B is in the act of taking possession of the goods, and of removing them out of the county, C threatens to sue out an attachment against the goods for his debt, in consequence of which threat, B promises that the surplus over and above his debt should go to the payment of the debt of C; whereupon C, relying on such promise, desists from suing out the attachment, the promise is an original undertaking on the part of B, and not a promise to answer for the debt, default or miscarriage of another, and hence need not be in writing.

3. Where a charge is asked, which some of the testimony warrants, it should be given, although such testimony may be in conflict with other evidence in the case. 12th March, 1872.

Statute of Frauds. Promise to pay another's debt. Before Judge GREEN. Spalding Superior Court. February Term, 1871.

The necessary facts are in the opinion.

SPEER & BECK, for plaintiff in error, cited 1 Par. on C., 444; Smith on C., 113, 118, notes; 5 Burr R., 186; 10 Wend. R., 461; 4 Cow. R., 432, 439; Roberts on Frauds, 252; 10 John. R., 412; 18th, 12; 10 Ga. R., 96; 14th, 683; 37th, 30; R. Code, sections 1940, 2906, as to Statute of Frauds.

PEEPLES & STEWART, for defendants.

MONTGOMERY, Judge.

William E. Davis and Cox were partners. In 1867, Davis sold out to Cox his interest in the partnership stock, consisting of boots, shoes, leather, etc., in their store, in Macon, for about $1,500, for which he took Cox's notes, payable to Joseph O. Davis, his father. Afterwards, Banks, the brother-in-law of Cox, bought out Cox, to secure an

indebtment of Cox to himself, of about $3,000—he agreeing to take the stock at $4,000, or about that sum. While Banks was in the act of removing the goods from Macon to Atlanta, the attorney of Mr. Joseph O. Davis called at the store of Cox to secure the payment of his client's debt, if possible, Mr. Joseph O. Davis claiming to be the owner of the notes. Mr. Lanier testified that he threatened to stop the removal of the goods, by legal process, unless some compromise was effected; whereupon Cox and Banks agreed, if he would not interfere, to give him Banks' note for the $1,000 over and above Cox's indebtment to Banks, which Banks was to pay, after satisfying Cox's debt to him, and upon receiving this promise, Lanier desisted from proceeding against the goods. Both Cox and Banks deny making any such promise. The goods were removed; Banks' note was demanded by complainant, which Banks and Cox refused; and the present bill is brought to compel a specific delivery of the note, or a payment of the money. The Judge charged the jury "that, if they believed, from the evidence, the complainant had sued, or was about suing, an attachment against John W. Cox, one of the defendants, who was in the act of removing his goods, and selling the same to Banks, and, on an interview between counsel for complainant and defendants, Banks agreed and promised, if plaintiff would forbear to levy said attachment, he (Banks) would, as soon as an invoice of said goods could be taken, give his note to complainant for at least the sum of $1,000, or a larger sum, if said excess of goods was over that sum, over and above his debt against Cox, and you believe the complainant did forbear to levy his attachment, and that Banks got the benefit of said goods, then you may find and decree that Banks should pay that amount, or a larger amount, if said excess exceed the $1,000, over and above Cox's indebtedness to Banks—*if you believe Banks' agreement to the complainant was in writing, and signed by him, or some one by him duly authorized.*"

The jury found for the defendants, and complainant excepted to the qualification of the charge, as contained in the last clause, which I have put in italics—equivalent to a a request for the charge without the qualification. We think the qualification was wrong, and that the complainant was entitled to the charge without it. Assuming Lanier's evidence to be correct, the promise of Banks was an original undertaking, and not a promise to answer for the default or miscarriage of another: *Hodgson vs. Anderson*, 3 B. & C., 842. *Dixon et al. vs. Hatfield*, 2 Bingham, 439. *Tanner vs. Grover*, 9 Rich., 306. Chitty on Contracts (9th Am. ed.), 451–2, and cases there cited. In which last authority it is laid down, "although the debt of another form the subject-matter of the defendant's undertaking, still, if he promised to pay the debt upon some new consideration, raised by himself, and the consideration was the creditor's resignation of a charge or lien on goods, which afforded him a remedy or fund to enforce payment, the case does not fall within the statute." Again, "it may be questioned whether any case similar to those above cited would now be held not to be within the statute, unless it appeared that the promisee, *by giving up his lien or charge on the property of the party originally liable, had left himself wholly without a remedy against him.*" (It is alleged, in the bill, that Cox is wholly insolvent.) "Where, therefore, the plaintiff, who had a judgment and execution against one L. was induced, by defendant, to withdraw the execution, the latter taking an assignment of all L.'s property, and undertaking to pay the plaintiff's debt, it was held that this was not a promise within the statute, because, by the arrangement, L. had been discharged. *Ibid.*, 452.

We think, then, at common law, the undertaking of Banks was an original one. But was not the agreement between Lanier, Cox and Banks an assignment of the debt of the last-named to the complainant, in payment of Cox's debt to him, assuming, of course, Lanier's statement to be

correct? If so, the Statute of Frauds is not applicable to the case, in any view. Upon a review of all the facts, we reverse the judgment.

THOMAS MCKIBBON *et al.*, plaintiffs in error, *vs.* JOHN J. FOLDS, defendant in error.

(BY TWO JUDGES.)—The Court below adjourned on the 15th of March, and the bill of exceptions was not certified till the 15th of April thereafter. The bill of exceptions was dismissed because it was not certified within thirty days from the adjournment of the Court. (R.) 9th March, 1872.

DOYAL & NUNNALLY; PEEPLES & STEWART, for plaintiffs in error.

D. J. BAILEY, by Z. D. HARRISON, for defendant.

JORDAN LYONS, plaintiff in error, *vs.* JESSE STEPHENS, defendant in error.

(BY TWO JUDGES.)—1. Where S. is sued on a warranty of the soundness of a negro, and in settlement of the case gives his promissory note for half the amount for which he originally sold the negro, such note is not a "debt, the consideration of which was a slave."

2. Where S. is induced to give his note to L. in settlement of a suit by the latter on a warranty of soundness of a negro, on the representation of L. that he had been compelled by suit to pay a third person, to whom he had sold him, and for which judgment had been obtained against him on account of unsoundness of the negro, when, in fact, he had only paid a part of the judgment; the statement by L. is not such a misrepresentation of a material fact as constitutes a good defense to the note when sued on by L. 12th March, 1872.

Slave debts. Misrepresentation. Promissory notes. Before Judge GREEN. Upson Superior Court. November Term, 1870.

Lyons sued Stephens upon his promissory note for $500 made in 1867. In the defense it appeared that Stephens sold a slave to Lyons in 1858, for $1,000, and Lyons sold the same slave to Freeman for $1,300. In each case there was a warranty of soundness. The slave was unsound, and Freeman recovered $1,300 against Lyons for that reason. Lyons then sued Stephens upon *his* said warranty. In compromise of that suit Lyons took from Stephens the note sued on; but Stephens would not have given the note had not Lyons told him that he, Lyons, had paid Freeman's judgment, or the greater part of it. So far, from having paid Freeman's judgment, Lyons paid $425 in 1862, and in 1869 stopped it by an affidavit, that it was illegally proceeding because it was for a slave debt.

The Court instructed the jury to find for the defendant if said note was given for a slave, or if Stephens was induced to give the note by Lyons representing that he had paid Freeman's judgment, or a large part of it, when such was not the truth. The jury found for the defendant. Lyons complains of said charges.

SPEER & BECK, for plaintiff in error. This representation was not as to a *material* fact: R. Code, sec. 3119. This is for the jury: 2 Pars. on C., 770. As to fraud in procuring note: 5 Ga. R., 473; 2 Kent's Com., 489.

C. PEEPLES, for defendant.

MONTGOMERY, Judge.

This was an action on a note given to compromise a suit on a breach of warranty of soundness of a slave. The plaintiff had purchased a negro from the defendant, which the latter had warranted as sound. Shortly after the plaintiff sold the slave, also with warranty of soundness. The negro proved unsound, and plaintiff was sued by his vendee, and judgment obtained by the latter for $1,300. Part of this

judgment, some four hundred and odd dollars, plaintiff paid and represented to defendant, whom he then sued on his warranty, that he had paid the greater part of it. Whereupon, to compromise the suit brought on his warranty for $1,000, defendant gave the note now sued on for five hundred dollars. The defense is, first, negro consideration of the note; secondly, misrepresentation of a material fact by the plaintiff, whereby defendant was induced to give the note, to-wit, the statement that plaintiff had paid the greater part of the judgment obtained against him on his warranty of the same negro.

A warranty of soundness of a negro is not a debt, the consideration of which was a slave, but rather a contract, the consideration of which was the price paid for the slave. Much less is the note given to compromise a suit on the warranty, a contract, the consideration of which was a slave. Nor was the misrepresentation by the plaintiff, that he had paid the greater part of the judgment against him on his warranty of soundness, a misrepresentation of a *material* fact. A material fact is a fact which is substantially the consideration of the contract: Chitty on Contracts, 392. What is a consideration for a contract? "The consideration must be some benefit to the party whom the promise is made, or to a third person, at his instance, or some detriment sustained at the instance of the party promising, by the party in whose favor the promise is made:" 4 East, 455; 1 Taunt., 523; 13 S. & R., 29. What benefit was the statement by the plaintiff that he had paid the greater part of the judgment against him, to the defendant? It certainly was no benefit to any third party at his instance. Much less was it a detriment sustained by the plaintiff at the instance of the defendant. It was simply a statement of a fact entirely irrelevant to their suit.

Judgment reversed.

THOMAS J. THRELKELD *et al.*, plaintiffs in error, *vs.* MILES G. DOBBINS, defendant in error.

(BY TWO JUDGES.)—1. A debt due by the plaintiff to one of several defendants in a suit cannot be pleaded by the defendants as a set-off, unless there be some special cause shown; and an agreement, by the plaintiff, that such debts shall go as a credit on his claim against both, is such special claim.

2. Where two parties settle a running account between them, and the debtor consents, after the balance is struck, that the amount found due shall be credited on a promissory note, held by him against the creditor and another, and the credit is made accordingly:

Held, That is no agreement that an additional sum, then in fact due on the account, but, by mistake, not credited on it at the settlement, shall also be put as a credit on the note.

3. The defendant's pleas in a cause must clearly and distinctly set forth his defense, and are to be construed most strongly against him.

4. When there has been a settlement between the parties of an account, and one of the parties desires to open the settlement, on the ground of mistake, the pleadings should set forth distinctly the items of the mistake, and distinctly allege that such items were omitted. 12th March, 1872.

Set-off. Pleading. Before Judge GREEN. Spalding Superior Court. August Term, 1871.

Dobbins sued T. J. Threlkeld and another upon their joint promissory note. Threlkeld pleaded that Dobbins owed him for the proceeds of certain cotton, which Dobbins had sold for him, and had not accounted for (giving dates, etc.) Further, he pleaded that Dobbins, being indebted to him for cotton, sold for him by Dobbins, they had a partial accounting and settlement thereof. As the result thereof, Dobbins admitted that he owed Threlkeld $3,000; and, by mutual consent, said amount was then credited upon the note sued upon. Before said credit was made, it was agreed that all errors, if any, in said settlement, should be corrected, and there were errors in said settlement, showing that Dobbins then owed him $1,081 more than said $3,000. It was agreed, at the close of said settlement, that the

amount found due Threlkeld should be credited on said note. If this excess is allowed as a set-off, the note sued on will be paid in full. Upon demurrer, these pleas were stricken, and that is assigned as error.

SPEER & BECK; DOYAL & NUNNALLY, for plaintiffs in error. As to set-off and recoupment, cited 25 Ga. R., 714; R. Code, sections 2852, 2853; 12 Ga. R., 77; 7th, 414; 37th, 364; 8th Bacon's Abr., 651; 12 S. & R., 9–68; 8 How. R., 454; 3d Wait's Dig., N. Y. R., 1664; 4 Ga. R., 198; 6th, 509; 5th, 357, etc.

PEEPLES & STEWART, for defendant.

McCAY, Judge.

1. Independently of the settled rule, under the English statutes of set-off, our Code provides that set-off must be between the same parties, and in their own right: Code, section 2850. This section of the Code, however, recognizes some special exceptions. Two are mentioned, to-wit, the case of a surviving partner, and a debt due to the principal, in a suit against the principal and security, and it also contains a general proposition, that even debts not originally mutual, may, under certain circumstances, be set-off, as if they have in any way been brought equitably within the rule of mutuality. It would seem very clear that parties may, by agreement, make any debt a set-off. If the agreement be for a consideration, it is binding on the same terms as any other agreement; and if it be executed, it needs no consideration.

2. To apply these principles to this case: If, after this settlement was made and the balance struck, Dobbins agreed that the amount so found should be credited on this note, and it was so done, the transaction was so far executed. Dobbins might very well agree to this, as he was satisfied with the amount, knew what it was, and could act understandingly. If this was the transaction, and there was then made an

agreement that the settlement of the amount was not to be conclusive, and that there was to be a reinvestigation, we see no reason for holding Dobbins' agreement to put the amount that they agreed upon on the note to cover also an agreement to put any subsequent amount also on the note. He might be very willing to agree to the one thing, and very unwilling to agree to the other. They are very far from being the same thing. But if it was agreed, *on going into the settlement*, that whatever amount was found due, on striking a balance, should go on the note, then, if the balance found was, at the *time*, not considered final, the agreement to have a re-examination would carry over also the agreement to credit the note with the final balance. We do not think the defendant's pleas state the facts as this latter proposition supposes the agreement to be. Indeed, the pleas are very defective, so much so that we suspect there must be some omission in the record, though there was no complaint of this in the argument. It is impossible to say from these pleas that this agreement was to the effect that, whatever amount should be found due should go on the note. The fair, and most natural reading is, that the agreement to put the amount on the note was subsequent to the finding the balance.

3. It is the duty of a defendant to state his case, and the Court will not strain a point to make it out for him. We take it for granted he has gone as far in his statement as his conscience will let him, and so treating his plea, we think the Court was right in striking it. It did not, as it stood, make the case of an agreement to treat this unsettled balance as a set-off against this note.

4. We think this plea objectionable on other grounds. After a formal settlement between parties, it ought not to be opened and re-examined on a mere general claim that it was wrong. Specifications ought to be made. If there were mistakes they ought to be pointed out. These pleas did none of this.

Judgment affirmed.

J. A. HAYDEN, administrator, plaintiff in error, *vs.* BENJAMIN MCKNIGHT, defendant in error.

(BY TWO JUDGES.)—When the maker and indorser of a note are sued in the same action by the administrator of the indorsee, and the maker is dismissed from the action on account of his having received his discharge in bankruptcy, and the issue was whether the indorser was discharged by indulgence granted by the indorsee to the maker, the maker is a competent witness in behalf of the indorser to prove that the indorsee, in his lifetime, gave such maker indulgence on said note for a valuable consideration. 12th March, 1872.

Evidence. Witness. Before Judge GREEN. Henry Superior Court. October Term, 1871.

The facts are in the opinion.

CLARK & PACE, for plaintiff in error.

J. J. FLOYD; J. R. NOLAN, for defendant.

MONTGOMERY, Judge.

This was a suit on a note given for $1,350, dated February 13th, 1860, and payable December 21st after date, signed by S. R. Weems, as maker and Benjamin McKnight, as indorser. The maker having produced in Court his certificate of discharge in bankruptcy, an order was taken dismissing him from the case.

He was then offered by his late co-defendant as a witness to prove that the intestate of plaintiff, who was the payee of the note had, in his lifetime, granted him indulgence for a valuable consideration. Plaintiff objected to the witness on the ground that his intestate, one of the original parties to the contract was dead, and relied on *Stamper's case*, 37 *Georgia Reports*, 118; *Ibid* 586, 623; 39 *Georgia Reports*, 186; 42 *Georgia Reports*, 120; Code, section, 3798. The Court overruled the objection and plaintiff excepted.

The case most nearly analogous to the present is *Stamper's case*, 37 Geargia Reports, 118. We think, however, there

is a marked distinction between the two cases. Stamper, in the case in 37 Georgia Reports, was a party to the record in whose favor the verdict, if plaintiff recovered, must necessarily go. He "was a necessary party; the recovery could be had alone in his name, and, therefore, he was offered as a witness to testify in his own favor." Here the witness is not a party to the record, and is not offered "*to testify in his own favor.*" This would seem to be the touchstone under the statute if he is not called to testify in his own favor," he is competent. And, even when called to testify in his own favor, if he is not called against the interest of deceased party to the contract, this Court has decided him competent, *Hodnett vs. Perry*, 38 Georgia, 106.

Judgment affirmed.

COHEN & MENKO, plaintiffs in error, *vs.* THE SOUTHERN EXPRESS COMPANY, defendant in error.

1. This case must be controlled by that of the *Southern Express Company vs. Shea*, 38 Georgia, 519, in which it is laid down that, "when a common-carrier receives and receipts for goods to be transported beyond the terminus of his own line, he undertakes to transport the goods to the point of destination, either by himself or competent agents, and if the goods are lost beyond the terminus of his own line, he will be liable therefor."
2. The owner of the goods cannot hold such agents liable on the contract of bailment.

Common-carriers. Contracts. Before Judge HOPKINS. Fulton Superior Court. April Term, 1871.

Plaintiffs averred that the Southern Express Company was a common-carrier of goods from "Savannah, Georgia, to Atlanta, Georgia," and as such carrier, in New York, in October, 1865, received from them certain goods, (described) to be carried from Savannah, Georgia, and delivered to plain-

tiffs in Atlanta, for a certain reward, and yet behaved so carelessly and negligently as that the said goods were never delivered to them, but wholly lost. The defendant pleaded the general issue; that it received said goods from the Adams Express Company, at Savannah, to be carried to Atlanta, Georgia, under a special contract that it was not to be liable for loss by river navigation; that there was no way for shipping to Atlanta then except by the Savannah river, and that, without its fault, said goods were lost by the sinking of the boat *en route* up said river for Atlanta.

Plaintiffs proved that they bought said goods in New York, and ordered them marked, "Cohen & Menko, Atlanta, Georgia, per Adams Express Company," and to be shipped to Atlanta, but made no special contract that the Adams Express Company was to bring them all the way; indeed, at that time the Adams had its inland terminus in Virginia, and its sea terminus at Savannah, and at these points usually delivered goods to the Southern Express Company, and supposed that this would be done in this case; but they made no contract about the shipment except as aforesaid. They proved the value of the goods, that they were in possession of the Southern Express Company, and that the bulk of them were never delivered. They showed that a small part of them came through, damaged by water; that the Southern Express Company's agents at Atlanta, Georgia, offered to deliver them, at the same time demanding certain heavy charges for wreckage, etc., saying the goods were sunk in the Savannah river, and they declined to accept the damaged goods or to pay the charges. They also showed two circular letters from the agent of the Southern Express Company, at Savannah, asking them to forward their invoices, that he might discover whether any of their goods were saved from said wreck.

The merchants from whom the goods were bought, testified to their value, and that they were instructed to mark and ship as aforesaid, and did so, without making any special contract as to shipment. By another witness they showed that

it was customary for the Southern Express Company when it received goods from the Adams to pay its freight, and upon delivery to collect that and its own charges. This witness also testified that at the time in question, the Adams had an all-rail route from New York to Atlanta, Georgia. They offered to prove that said Express Companies were the same company, having different names. For want of such averment this evidence was rejected.

They then put in evidence the receipts given for the goods by the Adams Express Company. They were all as follows, *mutatis mutandis:*

ADAMS EXPRESS COMPANY.
Great Eastern, Western and Southern Express Forwarders.
NEW YORK, October 26, 1865.

No 13,698.

Received of H. B. C. & Co., one case ....., value ....., marked Cohen & Menko, Atlanta, Georgia, which it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only, and there delivered to other parties to complete the transportation. It is part of the consideration of this contract, and it is agreed that the said Express Company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carrier to whom the same may be by said Express Company entrusted, or arising from the dangers of railroad, ocean or river navigation, steam, fire in store, depots, or in transit, leakage, breakage, or from any cause whatever, unless in every case the same be proved to have occurred from the fraud or gross negligence of said Express Company or their servants; nor in any event shall the holder thereof demand beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured by them and so specified in the receipt, which insurance shall constitute the limit of the liability of the Adams Express Company; and if the same is entrusted or delivered to any other Express

Company, or agent, (which said Adams Express Company are hereby authorized to do) such company or person so selected shall be regarded exclusively as the agent of the shipper or owner, and, as such, alone liable, and the Adams Express Company shall not be in any event responsible for the negligence or non-performance of any such company or person; nor in any event shall said Express Company be liable for any loss or damage, unless the claim therefor shall be presented to them in writing, at the office, within thirty days after this date, with a statement, to which this receipt shall be annexed. All articles of glass or contained in glass, or any of a fragile nature, will be taken at shippers' risk only, and the shipper agrees that the company shall not be held responsible for any injury by breakage or otherwise, nor for damage to goods not properly packed and secured for transportation. It is further agreed that said company shall not, in any event, be liable for any loss, damage or detention caused by the acts of God, civil or military authority, or by rebellion or riot, or the dangers incident to a time of war.

For the company.

McDONOUGH.

Plaintiffs closed. Defendant moved for a non-suit, relying upon Shea's case: 30 Georgia Reports, 579. The non-suit was granted, and that is assigned as error.

P. L. MYNATT, for plaintiffs in error, asked to review Shea's case, 38 Ga. R., 519. There was a privity of contract between plaintiffs and defendant: 8 Tenn. R., 330; 3 East. R., 585; 1st Ch. Pl., 6 & 7; R. Code, sections 3192, 3193; 2 Kernan, N. Y. R., 343; 3 Brod. & Bingh., 177; Ang. on Car., sections 93 and 516. Effect of delivery in New York: 5 Seld. R., 180; 4th, 502; 6 Hill's R., 167. As to ratifying special contract: 9 Ga. R., 70; 12th, 205; 16th, 431; 28th, 544; Story on Agency, sections 250; 8th Gill. & J., 248; *Butler vs. Maples*, 9 Wallace. Contract of shipment is question for the jury: 8 M. & W. R.,

422; 4th Seld., 37. Motion for non-suit admits all facts averred and proved: 15 Ga. R., 491.

A. W. HAMMOND & SON, for defendant, relied on Shea's case, 38 Ga. R., 519, and Mosher's case, 38 Ga. R., 37.

MONTGOMERY, Judge.

This suit is an attempt made to hold the Southern Express Company liable on the contract of bailment, as forwarding agents of the Adams Express Company, of New York. The goods, whose loss is the foundation of the present suit, were shipped from New York to Atlanta, via Savanah, by the Adams Express Company. On the arrival of the goods in Savanah, the *terminus* of the line of the Adams Express Company, that company turned them over to the Southern Express Company, to be transported to Atlanta. The latter company placed them on board a steamboat, running on the Savanah river, to be carried to Augusta, and from thence shipped to Atlanta by rail. On the passage up the river, the boat sunk, and the goods were lost.

The facts bring the case within the principles laid down in *The Southern Express Company vs. Shea*, 38 Ga., 519. We, therefore, affirm the judgment of the Court below.

Judgment affirmed.

W. G. FORSYTH, plaintiff in error, *vs.* THE MAYOR AND COUNCIL OF ATLANTA, defendant in error.

(BY TWO JUDGES.)—A declaration by one against an incorporated city, alleging that said city had, by an ordinance, prohibited the erection of wooden buildings in certain parts of said city, and that the City Council had afterwards authorized B to build a wooden building within said limits, and that B's building, taking fire, had caused a building belonging to the plaintiff to be burned, is demurrable. 12th March, 1872.

Municipal Corporations. Negligence. Tried before Judge HOPKINS. Fulton Superior Court. April Term, 1871.

Forsyth averred that he owned certain wooden buildings, in the fire limits of Atlanta, a corporate city, and that its Mayor and Council were bound to protect them against fire; that they had, at the time, an ordinance forbidding the building of any but fire-proof buildings within said specified limits, and forbidding blacksmith's shops to be built within certain distances from other houses. And yet, while said ordinance was of force, they permitted one Finney, by his special request, to build a wooden shop, and keep a blacksmith's shop in said fire limits, and within a shorter distance from Forsyth's buildings than was allowable by said ordinance; that Finney's said buildings took fire, and were destroyed, and communicated fire to *his* buildings and contents, whereby *they* were destroyed. He prayed that defendant be compelled to pay his loss. Upon demurrer, the Court dismissed the cause. That is assigned as error.

J. T. GLENN, for plaintiff in error.

W. T. NEWMAN, City Attorney, for defendant. Defendant is public corporation: R. Code, section 1672. It is not liable for a tort: 2 Tenn. R., 671; 2 Hill (S. C.) R., 571. It could exercise its discretion as to fire limits: 1 Denio, N. Y. R., 595; 19 Ga. R, 490; 20th, 635; 5 Am. Law Reg., 53; Abbott's Dig. L. of Corp., 487; 1 Hill's R. (N. Y.), 562.

McCAY, Judge.

Were this a case when, after an ordinance of a city was adopted and published, one had built in accordance therewith and, on the faith that no wooden buildings would be permitted to be put up within the fire limits, and after thus acting and thus building, the city should permit a wooden

building to be erected, by the building of which, plaintiff's house was burned, the argument made in the hearing might have some force. But, as the case is put in the declaration, the plaintiff's own house was a wooden one, and must have been built either before the ordinance was passed, or in violation of it, or by the same permission as is complained of. In either case the plaintiff has come to no harm from the city. He did not build on the faith of the ordinance. If a dangerous structure was put up near his he had his remedy against the builder of it, by injunction. The permission of the city did not and could not justify any private person to erect a nuisance, its permission is a mere waiver of its rights. Persons damaged had their remedy, either preventive by injunction or remedial by abatement.

Judgment affirmed.

SQUIRE ANDREWS, plaintiff in error, *vs.* THE MAYOR AND COUNCIL OF ATLANTA, defendant in error.

(BY TWO JUDGES.)—1. A policeman, sworn in by the Mayor of Atlanta, and performing the duties of policeman, though he may not have been elected as prescribed by the Act of Incorporation, is an officer *de facto*.

2. Where a person is presented, under the city ordinances, for obstructing such an officer in the discharge of his duties, and convicted, and the evidence on the part of the prosecution fully sustained the conviction, this Court will not, as a general rule, interfere. 12th March, 1872.

Municipal Corporations. Officers *de facto*. Before Judge HOPKINS. Fulton Superior Court. April Term, 1871.

Andrews was charged before the Mayor and Council of Atlanta "with interfering with an officer on the 27th day of June, 1871." What he did is unnecessary; suffice it to say there was sufficient evidence of interference to support a judg-

ment of guilty. Belcher was the man interfered with. It was admitted that Belcher was only policeman for Schofield's rolling-mill yard, and kept there by Schofield to keep peace and order; that he was selected, employed and paid by Schofield, but sworn in by the Mayor of Atlanta, but was never elected as a policeman of Atlanta by the Mayor and Council by ballot or otherwise as the city law requires. He was undertaking to remove from the yard a person whom Schofield ordered off and who refused to go. It seems to have been conceded that said mill was in the city. Andrew's counsel insisted that he was not guilty, because Belcher was not an officer of the city; that there was no *charge* of interfering with Belcher "*while in discharge of his lawful duty,*" and that the evidence was too weak for conviction. He was convicted and sentenced. A *certiorari* complaining that said conviction was wrong, for the reasons above suggested, was refused. That refusal is assigned as error.

THRASHER & THRASHER, for plaintiff in error.

W. T. NEWMAN, City Attorney, for defendant. Belcher was *de facto* officer: 7 John's R., 549; 5 Ga. R., 244; 30th, 426.

MONTGOMERY, Judge.

Nothing need be added to the judgment in this case as pronounced from the bench. (See head notes.)
Judgment affirmed.

TOMMEY & STEWART, plaintiffs in error, *vs.* A. T. FINNEY, defendant in error.

(BY TWO JUDGES,)—Where A sues B in a Notary's Court on an open account, on which he obtains judgment, and from which defendant appeals, and, pending the appeal, A brings another suit against B in the

Superior Court, on another open account, which was due at the commencement of the first suit, both accounts being admitted correct, to which second suit B files no plea in abatement at the first term, but at the second term pleads the judgment obtained in the Notary's Court in *bar* of the second suit, and while both cases are pending in the Superior Court, "it is agreed that the jury shall find such verdict in said cases as the Court, under the agreed state of facts, may direct, and it is further agreed that the Judge shall consider both cases together:"

Held, That, under the foregoing facts, there was no such judgment existing as could be pleaded in bar of the suit brought in the Superior Court, and that the Court should have instructed the jury to find a verdict for the plaintiff for the amount of both accounts.

2. A defendant who has appealed, had no right to withdraw his appeal, without the consent of the plaintiff. 12th March, 1872.

Abatement. Splitting demands. Appeal. Before Judge HOPKINS. Fulton Superior Court. April Term, 1871.

For the facts see the opinion.

HILL & CANDLER, for plaintiffs in error. The causes of action were different: R. Code, sections, 3196, 2888, 2843; 16 John's R., 136. But if the same, they were both pending in Court, and the Court should have consolidated them: R. Code, sections, 194, 2888.

L. J. WINN, for defendant. When first suit began all was due, and plaintiffs may not split demands so: R. Code, sections, 2888, 480, 481, 4068; 8 Wend. R., 492; 13th, 644; 2 Conn. R., 431; 4th, 362; 2 Pars. on C., 620. Defendant was entitled to a verdict, as his plea of other action was in bar: 39 Ga. R., 189.

MONTGOMERY, Judge.

This case consisted originally of two—one, a suit in a Magistrate's Court, appealed to the Superior Court; the other, a suit brought in the Superior Court, after the magistrate's case had been appealed. The two cases were submitted to the Judge, upon the following agreed state of facts, after stating

the cases: "It is agreed by and between the parties in the two above stated cases, that the goods charged and which make up the amounts in the accounts in the above stated two cases, were all sold and delivered by the plaintiffs to the defendants, for the prices set forth in and at the times set forth in the said accounts; that at the time the suit was commenced in the Notary Public's Court on the amount for $88 57, to-wit: the 10th day of October, 1868, the account sued on by the plaintiff for $121 37, to this Court, May Term, 1870, the second above stated case, was also due."

"Before either of the accounts were made, to-wit: prior to April, 1867, it was agreed by and between the said parties, that the goods to be bought by him, defendant, from plaintiffs, should be paid for at the end of each month; that under this, the goods for which the account of $88 57, sued in the Notary Public's Court, were sold in the month of April, 1867. Afterwards, from May, 1867, to May, 1868, the accounts making the $121 37, sued in the last stated case, were made, to be paid for at the end of the several months in which the same were contracted; that during said period, from May, 1867, to May, 1868, other goods were bought from the plaintiffs by the defendant, under said contract first aforesaid, to be paid for at the end of the month in which bought, and were paid for, leaving the accounts making the $121 37 unpaid, when they were put together and sued as above stated.

That the suit in the Notary's Court for $88 57 was brought when the accounts for $121 37 were due, and judgment rendered in said suit, and appeal by the defendant entered to the Superior Court from said judgment before the second case aforesaid was brought to this Court, and the suits are now pending in this Court. It is further agreed, that the jury shall find such verdict in said cases as the Court, under the agreed state of facts, may direct; and it is further agreed, that the Judge shall consider both cases together."

After argument had, the Court passed the following order:

"Ordered by the Court that the foregoing cause be dismissed." Whereupon plaintiffs excepted.

It is insisted by defendant in error, that both accounts sued on are, under the agreed state of facts, but one and should have been sued in the same action; that plaintiffs, having chosen to sue on a part of it, the judgment in that case is a bar to the second suit, and he relies on 8 Wendell, 492, Code, sec. 2888, and other authorities. The reply is, that an appeal is a *de novo* investigation, and the first action is a suit *now pending* in the Superior Court: Code, section 3571; and that hence there is no judgment to bar. But it is said, conceding it to be so, the pendency of the first action is a "good defense" to the second: Code, sec. 2843, and the order dismissing the cases gave the defendant the benefit of this defense to the second action, and left the plaintiffs free to enforce their judgment in the first. True, it was a "good defense" as *a plea in abatement:* Code, section 3426, and must have been pleaded as such at the first term: Code, section 3404, whereas it was pleaded in *bar* at the *second* term. Nor could the appeal be dismissed without the consent of the plaintiffs: Code, section 3573. They were, at least, entitled to present their claim for twenty-five per cent. damages, to the jury: Code, section 3575. Had the plea in abatement been filed at the proper term, while it would have compelled a dismissal of the second suit, could not the plaintiffs have amended the first, so as to include the whole account? Code, section 3429. Is not the practical result of the submission a consolidation of the two suits, entitling the plaintiffs to a judgment for the whole amount? If a plea in abatement had been filed to the second suit, that suit dismissed and the debt on which it was founded engrafted on the first suit by amendment of the pleadings, would not the same result have been arrived at as that attained by the agreement? It would seem so.

Judgment reversed.

J. H. PORTER, plaintiff in error, *vs.* LIVELY & MCELROY, defendants in error.

1. Where the owner of a steam saw-mill seeks to enforce his lien for lumber, furnished under the Act of 1868 and the Amendatory Act of 1870, he should state, in his affidavit, that his steam saw-mill is located in the State of Georgia.
2. When the lumber has been furnished to a party in possession of the premises, for the erection of buildings and permanent fixtures thereon, who afterwards assigns and transfers the premises, the demand for payment of the lumber should be made on both the party to whom it was furnished and the party in possession of the premises on which the buildings and other fixtures have been erected with the plaintiff's lumber.

Lien. Pleadings. Demand. Before Judge HOPKINS. Fulton Superior Court. October Term, 1872.

Lively & McElroy made affidavit that they were owners of a steam saw-mill, without stating where it was; that they furnished, in May, 1870, certain lumber to one Mobley, with which he built certain fences, etc., on certain land therein described, and that they had demanded payment, but it was refused, without stating upon whom the demand was made. *Fi. fa.* issued and was levied upon said land.

Porter stopped the *fi. fa.* by an affidavit, that when the lumber was furnished, Mobley held the land under a bond for titles from him (Porter), who had the title; that Mobley never paid any part of the agreed purchase-money, for said land, and in December, 1870, he and Porter rescinded said contract. And he insisted that, under the facts, Mobley could not create a lien on the premises.

When the cause came on for hearing, Porter's counsel moved to dismiss the levy, because the affidavit did not state that the mill was in this State, nor upon whom said demand for payment was made. This was overruled. Upon motion of plaintiff's counsel, the Court then dismissed Porter's affidavit, upon the ground that *he* could not stop the *fi. fa.* by counter-affidavit. This is assigned as error.

NEWMAN & HARRISON, for plaintiff in error. Acts of 1868, p. 31; 30 Ga. R., 474, paragraph 7.

C. F. AKERS, for defendant. Lien attaches without regard to title of the land: R. Code, section 1959; 39 Mo. R., 165; 2 McCarter's R., 11; 9 Cal. R., 119.

WARNER, Chief Justice.

On the 10th March, 1871, an execution was issued on an affidavit made by Lively & McElroy, the owners of a steam saw-mill, to enforce a lien for lumber sold and furnished to one Mobley, of the value of $62 92, which lumber was to fence and enclose the place, and to build a stable or cow-house on the lot, upon which Mobley then resided, and claimed, as the owner; that the money was due for the lumber since the 10th day of May, 1870, that demand had been made for the payment of the same, which was refused, but did not state on whom the demand for the payment of the lumber was made and refused, nor did the affidavit state that the plaintiff's steam saw-mill is located in the State of Georgia. The execution was levied on the property described in the affidavit, by the sheriff. Afterwards, an affidavit was filed by Porter, claiming to be the owner of the premises on which the fixtures were erected, with the lumber furnished by the plaintiffs to Mobley, denying their lien for the following reasons: That Mobley held the premises under a bond for title from him; that he is the legal owner of the same; that no part of the purchase-money therefor had been paid; that about the 1st December, 1870, the contract for the sale of the land, between him and Mobley, was rescinded, he taking up his bond, first paying to a party to whom Mobley had pledged his bond, the sum of $592 95, when Mobley gave up to Porter all right and claim to the premises. On the trial of the case, it was agreed by the respective parties to submit the questions involved in it to the presiding Judge without the

intervention of a jury. The counsel for Porter made a motion to dismiss plaintiffs' affidavit, because it was not alleged therein that their steam saw-mill was located in the State of Georgia, and because the affidavit of the plaintiffs did not state on whom the demand for payment was made. The Court overruled the motion to dismiss plaintiffs' affidavit, and, on motion of plaintiffs' counsel, dismissed Porter's affidavit, on the ground that he had no right to arrest the proceedings, under the plaintiffs' *fi. fa.*, in the manner which he sought to do; whereupon the defendant, Porter, excepted.

1. In our judgment, the plaintiffs should have made a demand of payment for the lumber, not only of Mobley, to whom the lumber was furnished, but also of Porter, the assignee of Mobley, if he was in possession of the premises, on which the fixtures were erected, with their lumber, which had not been paid for, and should have alleged a refusal to pay for the same on the part of both.

2. As these summary remedies are to be strictly construed, the plaintiffs should have alleged, in their affidavit, that their steam saw-mill was located in the State of Georgia, inasmuch as the lien is only given to the owners of steam saw-mills located in this State, by the Act of 1868, and the Amendatory Act of 1870. If a demand had been made on Porter for payment of the lumber, and payment refused, with an averment that he was in possession of the premises, then he would have been a proper party to have made the counter-affidavit, contesting the plaintiffs' lien. Let the judgment of the Court below, be reversed.

Judgment reversed.

ISAAC G. MITCHELL, plaintiff in error *vs.* JESSE M. BUTT AND WIFE, defendants in error.

(BY TWO JUDGES.)—Where A, at the request of B, paid to C the purchase money of certain land, previously sold by C to B, with the understanding that A should have a lien upon the land for the money, as C had, and C, therefore, made to B a deed, and B gave to C a written promise to pay him the amount "for the south half of land lot number one hundred and thirty-two, containing one hundred and one and a quarter acres, more or less, lying and being in the 14th district of Fulton county:"

Held, That A had, before the adoption of the Code, a lien on the land, in equity, for the purchase-money, and a bill filed to enforce the same, was not demurrable. 12th March, 1872.

Vendor and purchaser. Estoppel. Before Judge HOPKINS. Fulton Superior Court. April Term, 1871.

Mitchell's bill against Butt and his wife made this case: In 1862, Butt and his wife had purchased of one Rogers certain described land, he agreeing to make them a title to the same when they paid the price of it to him. They had paid no part of the price, and could not. They asked Mitchell to pay Rogers the price for them, agreeing that if he would the land should be bound to him till his money was repaid. Accordingly, Mitchell paid Rogers the price, $900, Rogers made a title to Butt and his wife, and they gave Mitchell this paper:

"ATLANTA, GEORGIA, Nov., 14th, 1862.

"Two years after date, with interest from date, we promise to pay to J. G. Mitchell the sum of $900 for the south half of land lot number one, etc., (fully describing the land.) Witness our hands and seals," and they signed and sealed the same.

Now Butt and wife offer to sell said land, saying that their title to it is clear, and that there is no lien or encumbrance upon the same. He prayed that they be enjoined from selling, lest an innocent purchaser, without notice of said pa

per, might defeat his lien, and that the land be sold to pay said $900 and interest. This bill was dismissed for want of equity. That is assigned as error.

D. F. HAMMOND, for plaintiff in error. Rogers would have had a lien for the purchase-money, and Mitchell is subrogated to his rights in equity: 2 Bouv. L. D., 553; 6 Watts and S. R., 190; 2 Bouv. Inst., 1413; Revised Code, sections 2150, 2151; 37 Ga. R., 221; 34th, 387. Vendor's lien abolished in 1863. The contract sustains the bill: Revised Code, sections 3026, 1945.

J. M. CALHOUN & SON, for defendants. Mitchell was not vendor: 9 Ga. R., 90. The paper is what it was intended to be: 13 Ga. R., 94, and is simply a promise to repay borrowed money.

McCAY, Judge.

It would be a gross fraud to permit these parties to repudiate their solemn agreement, under their hands and seals, to the effect that, in the payment of this money for their benefit, the complainant should stand in the place of the original vendor of the land. Under the agreement they got the money, the vendor made them a deed, and they solemnly agreed that the money they owed the complainant was the purchase-money of the land. Whether this be in fact, true or not, they are estopped by their written and sealed paper from denying it. This is an estoppel by deed. But they are also estopped from denying the lien because they have gotten the plaintiff's money on that idea.

This question, as it stands, is a simple question between the parties, no third person's rights are in the way, and the equity in favor of the complainant is very strong. The lien of the vendor is founded on the equitable principle that, as he has sold his land, taking no other security, it is fair to presume that he looked to the land for his protection; and

that it is only right that the land shall stand charged with the debt contracted for its purchase. Much more is all this true here. These parties have gotten this land with complainant's money, and they have *agreed* that they so hold it. We think, therefore, that by the principles of equity, this bill is not demurrable.

Judgment reversed.

J. H. LOVEJOY & COMPANY, plaintiffs in error, *vs.* A. G. CHISOLM, defendant in error.

When A brought an action against B on a promissory note, and for the value of a bag of cotton belonging to A, but appropriated by B to his own use, and B pleaded the general issue and that the note was given for money won at cards by B's partner, and it appeared, in proof, that the note was, in part, for money won at cards, and that more money had already been paid on the note than was due upon it after deducting the gaming consideration:

Held, There being no plea of set-off filed, that the jury could not apply the money paid on the note to the discharge of the debt due for the bag of cotton.

Pleading. Gaming debt. Before Judge HOPKINS. Fulton Superior Court. April Term, 1871.

Chisolm sued Lovejoy and his partner upon their firm note, payable to him, for $945 and for $122, the value of a bale of cotton, which he had stored with them, as warehousemen, which they had refused to deliver on demand. Lovejoy having been adjudged a bankrupt, the cause was discontinued as to him. His partner pleaded *non assumpsit*, that he did not sign said note, nor authorize any one to do so for him, that Lovejoy made the note without his knowledge or consent, in a transaction wholly foreign to the partnership business, that the note was given solely for money won by Chisolm from Lovejoy at gaming, and that they did not have said cotton, as averred.

The plaintiff introduced the note. It had no date. He

proved that he stored a bale of cotton worth twenty-seven cents per pound with defendants. It was admitted that the note was given in January, 1866, when Lovejoy and Ballard were partners; that the cotton weighed four hundred and fifty-four pounds, and that $80C had been paid on the note.

Plaintiff rested his cause.

For the defense, Lovejoy testified, that while he and Ballard were partners they borrowed from Willis P. Chisolm $600, and gave the firm note therefor. A. G. Chisolm had this $600 note, saying it was his, and got Lovejoy to renew it and add to its amount $300, which he had won from Lovejoy at faro, and he afterwards paid $600 or $700 of the firm money on said note. He denied that his firm ever had said bale of cotton.

In rebuttal, Willis P. Chisolm testified that A. G. Chisolm sold him some cotton, which he had stored with Lovejoy & Company, and they delivered all but one bale of it to him, Willis P. Chisolm, and promised to account to A. G. Chisolm for the missing bale. Cotton was then worth from thirty to thirty-five cents per pound.

The Court charged the jury that if any part of the consideration of the note was for money won at gaming, plaintiff could not recover on the note. If the consideration of the note was partly illegal, and defendants made a payment on it and had it applied in part satisfaction of the note, the money so applied cannot, in this case as now presented, be set-off against the claim for the cotton. And he charged the law as to the claim for the cotton. The jury found for defendant.

Plaintiff's counsel moved for a new trial, upon the grounds that the verdict was contrary to law, etc. This grant of a new trial is assigned as error.

Hill & Candler, for plaintiff in error. The verdict was right, and, therefore, new trial was wrong: 41 Ga. R., 130; 40th, 266; R., Code, section 3027.

L. J. GARTRELL; H. JACKSON & BROTHER, for defendant. There was no plea of set-off, and, therefore, verdict was wrong, in so far as it did not find for the cotton.

McCAY, Judge.

Our law is very liberal on the subject of pleading. Still, the statute requires both the plaintiff and defendant, the one by his declaration and the other by his plea, clearly to set forth the grounds of the suit and of the defense. And this rule is of the greater importance, now that the pleas are required to be under oath. We have never yet laid down a limit to the extent to which a jury may go in settling, by their verdict, the legal and equitable rights of the parties in a suit at law. But, for the very reason that the jury has such powers, it is the more important that the pleading shall show what the case is, upon which the jury has found. We think the Judge was right in granting a new trial. The plaintiff had a right to the defendant's sworn plea of the set-off, and to have such notice of it as that he might controvert it if in his power. True, there is evidence going to show that the plaintiff has illegally received money from the defendant, and, it may be, is liable to him for it. But perhaps the plaintiff, had the plea been filed and notice thus brought to him of this defense, might have been able to show it was not a good defense. Besides, the record must show, that this set-off was relied on. Defendant may, perhaps, sue on it. How could the plaintiff show, by this record, that he had already paid it?

Judgment affirmed.

MORRISON, HEARD & COMPANY, plaintiffs in error, *vs.* E. G. PONDER *et al.*, defendants in error.

1. The lien of an attorney-at-law attaches, for his fees, upon all property recovered by his services, and is superior to all other liens thereon.
2. When, by the written consent of the parties, the questions of law and fact were submitted to the presiding Judge, in lieu of a jury, as to the fees claimed by counsel, in the particular case mentioned in the record, his judgment will not be set aside, unless some rule of law has been violated, or unless his judgment is so strongly and decidedly against the weight of the evidence as would authorize this Court to set aside the verdict of a jury.
3. If A and B are contesting for money, in the hands of a Receiver, a bill of exceptions will not be dismissed because said Receiver is not made a party thereto. (R. See report.)
4. If a cause is submitted to the Court to decide both as to the law and the facts, a writ of error will lie to his decision, though it is not so stipulated in the submission. (R. See report.)

Lien of Judgments, and for Attorney's fees. New trial. Before Judge HOPKINS. Fulton Superior Court. October Term, 1872.

The facts of this case are fully stated in the opinion. The money, about which the parties were at issue, was in the hands of George W. Adair, as Receiver, appointed by the Court, and the cause was begun by a rule against him by the attorneys. He answered that he had the money, subject to the order of the Court. Then Morrison, Heard & Company came and made the issue as to the right to take said fund.

Adair was not made a party to the bill of exceptions. The parties had agreed to submit the questions of law and fact to the Judge below, and did *not* agree that this Court might review his opinion. Defendant's counsel moved to dismiss the bill of exceptions, because Adair was not a party to it, and because this Court could not review said decision, in the absence of an agreement that it might do so. The motion was overruled.

CLARK & SPENCER; A. W. HAMMOND & SON, for plaintiffs in error.

L. E. BLECKLEY; J. M. CALHOUN & SON, for defendants.

WARNER, Chief Justice.

This was a motion made in the Superior Court to distribute the sum of $3,475, arising from the sale of one-half of a lot in the city of Atlanta, sold under the order and decree of a Court of equity, as the property of Ponder. By the written consent of the parties, both the facts and the law were submitted to the Judge of the Superior Court, in lieu of a jury, upon an agreed statement of the facts.

On the hearing of the case, the main question between the contesting parties was in relation to the lien of the attorneys, who had brought the money into Court, under the decree, and a judgment creditor of Ponder. The Court decided that the sum of $1,500 should be paid to Calhoun & Son, as well as certain specified fees to other counsel in the case, but as no complaint was made in this Court as to the allowance of attorneys' fees, except as to the fee of Calhoun & Son, our judgment will be confined to their claim.

It appears from the facts disclosed by the record, that in the year 1861 Ponder employed Calhoun & Son as his original counsel to institute an action of divorce against his wife, Ellen Ponder, and to file a bill, on the equity side of the Court, to set aside a deed made by Ponder to his wife, embracing a large amount of property, mostly slaves. The complainant contracted to pay them for their services the sum of $250 certain, and the sum of $2,500 on condition that the litigation should be determined in his favor. The litigation continued about ten years, and, by the results of the war, all the property was lost, except the city lot in the city of Atlanta. In January, 1871, a decree was taken by the consent of the parties litigant, that the city lot should be the

joint property of the complainant and defendant, and that the same should be sold and the proceeds thereof, after paying costs of suit, etc., should be paid, one half to the counsel of the respective parties, to be by such counsel paid over to their respective clients, subject only to such liens, for the fees of all counsel concerned, as may exist *by law*, or may be usually recognized by Courts of equity. "*The liens of counsel shall, until the sale, be in full force against the land itself*" In November, 1870, Morrison, Heard & Company obtained a judgment against Ponder, in the District Court of the United States, for the sum of $2,450. After the decree was rendered for the sale of the lot, to-wit: in February, 1871, Ponder and Calhoun & Son had a settlement in regard to their fee, by which they agreed to give up to Ponder his original obligation to pay the conditional fee of $2,500, and took his note for $1,500, as the amount due them for their services as his counsel in the divorce and equity cases.

1. What is the law applicable to the facts disclosed in the record? The 1979th section of the Code declares, that the attorney's lien shall attach, for his fees, upon all property recovered by his services, and shall be *superior to all other liens thereon.* The one-half of the city lot was recovered, and the proceeds of the sale thereof were brought into Court, by the services of Calhoun & Son, the original counsel in the case, and the decree of the Court of equity, which vested the title to the one-half of the lot in Ponder, expressly declares that the liens of counsel shall, until the sale thereof, be in full force against the land itself, and consequently was a lien on the proceeds of the sale of the land. When the judgment creditor obtained his judgment against Ponder, the latter had no interest in the lot which could have been levied on and sold as the property of Ponder. Ponder's interest in the property accrued only from the date of the decree, and that interest was subject to the lien of the attorney's fees; and the judgment creditor of Ponder has no greater or better claim to the proceeds of the sale of the lot than Ponder himself.

had. Ponder took the one-half of the lot, under the decre subject to the attorneys' lien for the fees due them, and hi judgment creditors are in no better condition than Ponde The attorneys have a *superior lien* on the land and the pr ceeds of the sale thereof, for the fees due them for servic rendered in recovering the property, either as against Pond or his judgment creditors.

2. The only remaining question is, whether the eviden disclosed by the record, is sufficient to sustain the judgme of the Court in awarding the sum of $1,500 to Calhoun Son, for their professional services, in the two cases in whi they were retained by Ponder? The evidence is, that th were his original counsel, drafted the libel for divorce a the bill in equity, in 1861, and have rendered services in t two cases ever since, a period of about ten years; principal made out the interrogatories for one side, and crossed the for the other side; carried on the correspondence with t complainant, and counseled and conferred with him at times when called on. Besides, there is the written contr of Ponder, promising to pay them $1,500 for their services the two cases. There is a *disclaimer* of any fraud or coll sion between Ponder and Calhoun & Son, to defeat the cla of the judgment-creditor in taking the note of Ponder f the $1,500, in February, 1871, and *no evidence* was offered show that their services were not worth *that amount.* T judgment of the Court, therefore, allowing them $1,500 f their professional services in the two cases, cannot be said be so strongly and decidedly against the weight of the e dence as to authorize this Court to set it aside and order new trial.

Let the judgment of the Court below be affirmed.

GEORGE T. FRY, plaintiff in error, *vs.* MARGARET B. LOFTON, defendant in error.

1. This Court will not control the discretion of the Court below in granting a new trial, when that discretion has been properly exercised, as it was in this case.
2. Where an attorney was employed by an executor to aid her in winding up and settling an estate, an action for his fee will not lie till twelve months after the qualification of the executor, that being the shortest time allowed for closing up an administration; nor can he recover one-half of the fee in such case, as a retainer under the 441st section of the Code. (R.)
3. An attorney can not recover for professional services without proof of their value.

New Trial. Assumpsit *Quantum meruit.* Special contract. Before Judge HOPKINS. DeKalb Superior Court. September Term, 1871.

Fry brought assumpsit against Mrs. Lofton for professional services by him, as her attorney-at-law, for $1,000, less $42 paid, and for $500 upon a special contract with her for that sum, promised in consideration that he would act as her counselor and attorney-at-law in the general management and administration of her deceased husband's estate, including the probate of his will, and her appointment and qualification as executrix of his will, and all services requested by her touching the administration of said estate.

On the trial, Fry showed that the husband died on the 9th of August, 1870, that he rendered said *specified* services for the defendant, and was ready to render all else that might be necessary; gave evidence tending to show such special contract, and that she and he disagreed about his fee, and that she discharged him, and he sued her as aforesaid on the 30th of said month. He did not prove the value of the services rendered. The Court charged the jury that he could not recover on his first count, without proving the value of the services, and could not recover on his special contract until

the end of the administration of the estate. The jury found for Fry, $257 27 and costs.

Defendant's counsel moved for a new trial, because the verdict was contrary to said charge, etc. The Court granted a new trial, and that is assigned as error.

E. N. BROYLES, for plaintiff in error.

HILL & CANDLER, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff, as an attorney-at-law, against the defendant, for professional services. The declaration contained two counts, one on an alleged *special* contract to pay him $500, for his services in the particular case, and the other was on an account stated. On the trial of the case, the jury found a verdict for the plaintiff for the sum of $257 27. The Court below set aside the verdict, and granted a new trial; whereupon the plaintiff excepted. It appears from the record that the plaintiff testified, that on the 9th day of August, 1870, James B. Lofton, the defendant's intestate, died, leaving the defendant his executrix and principal legatee; that soon after the testator's death and burial, the defendant employed the plaintiff to counsel and advise her in the winding up and settlement of the estate, for which service he told her he would not charge *exceeding* $500; that he rendered services in having the will admitted to probate, both in common and solemn form; went to her house to counsel and advise her, etc. In a short time the parties disagreed about the fee to be paid, and the defendant notified the plaintiff that she did not desire his services any longer, whereupon this suit was instituted. The plaintiff was not entitled to recover on the alleged *special* contract, because the suit was instituted before the expiration of twelve months from the time of defendant's qualification as executrix, the shortest time within which the estate could have been settled

and wound up according to law, the suit having been instituted on the 27th August, 1870, and the testator having died on the 9th day of the same month, according to the plaintiff's evidence. Although the plaintiff was entitled to recover on the account stated for his professional services rendered the defendant up to the time of his discharge as her attorney, whatever amount those services were proved to have been worth, the legal difficulty in the way of sustaining the verdict, on that count in the declaration, is the fact that the evidence in the record does not show what those services were worth. It is not sufficient to entitle the plaintiff to recover, to prove that he has rendered professional services to the defendant; he must prove what those services were worth. There being no evidence as to *the value* of the services rendered, there was no error in the Court below in setting the verdict aside and ordering a new trial.

This was not such a contract for a fee in the case as would authorize the plaintiff to recover one-half of $500, as a retainer under the provisions of the 441st section of the Code.

Let the judgment of the Court below be affirmed.

GEORGE D. WHITMAN *et al.*, plaintiffs in error, *vs.* R. B. BULLOCK, Governor, defendant in error.

When a defendant was arrested under a bastardy warrant, and gave bond and security to appear before a Jusitce of the Peace at a future day for the hearing of the accusation contained in the warrant:
Held, that the bond so given was a legal and valid bond.

Suit on Bond. Amendments. Before Judge HARVEY. Walker Superior Court. June Term, 1872.

Martha J. Carson went before a Justice of the Peace and procured him to issue a warrant against Whitman, for bastardy. He was arrested by the bailiff and brought before the Justice for trial. Not being ready, he procured the case

to be continued till a day fixed, and gave bond and security for $250, payable to R. B. Bullock, as Governor of this State and his successors, conditioned to be void if he should appear before said Justice on said day to answer said charge.

He failed to appear. Suit was brought in favor of Bullock, for the use of Miss Carson, on said bond, against Whitman and his securities, averring Whitman's failure to appear as aforesaid, and that she had been compelled to spend money in support of her said bastard child.

The declaration was demurred to upon the ground that there was no authority in law for taking said bond, and that Miss Carson had no interest in it, and could not recover on it. The Court overruled the demurrer upon condition that plaintiff's counsel would strike out all the allegations making a claim for Miss Carson, and that the Solicitor General would prosecute the suit in behalf of the State. This is assigned as error.

E. M. DODSON, by WILLIAM H. DABNEY, for plaintiff in error. The Justice had no authority to take that bond: R. Code, section 4664. The amendment made a new case: R. Code, sections 3430, 3434.

No appearance for defendant.

WARNER, Chief Justice

The defendant was arrested under a bastardy warrant, issued by a Justice of the Peace, and not being ready for a hearing, the case was postponed to a future day, and the defendant gave bond and security for his appearance on the day named by the Justice, for the hearing of the charge contained in the warrant. The defendant failed to appear at the time appointed and suit was instituted on the bond, in the name of the Governor, for the use of Martha J. Carson, against the principal and his securities. There was a demurrer to the declaration, which was overruled by the Court,

and the declaration ordered to be amended by striking out the name of Mary J. Carson, the usee, to which the defendants excepted.

This was a *quasi* criminal proceeding against the defendant, for investigation before the Justice. The defendant was legally arrested and brought before him upon the accusation of bastardy, and the bond for his appearance was legally taken, in accordance with the provisions of the 4633d and 4635th sections of the Code.

Let the judgment of the Court below be affirmed.

WESLEY SHROPSHIRE *et al.*, plaintiffs in error, *vs.* MARY BROWN, administratrix, defendant in error.

To entitle a complainant to a decree for a specific performance of a parol contract for the sale of land, the contract must first be established with reasonable certainty, and the consideration claimed to have been paid or rendered therefor must be clearly and satisfactorily proved to have been paid or rendered, in pursuance of that contract; otherwise, a specific performance of the alleged contract should be refused.

Specific performance. Before Judge HARVEY. Chattooga Superior Court. March Term, 1871.

The bill of Mary Brown, as administratrix of Warren Brown, averred as follows against Shropshire and Ward, as executors of William Brown, her father-in-law: In 1857, her husband lived in Arkansas and his father lived in Georgia. William Brown wrote to Warren that if he would come to Georgia and take charge of his plantation and slaves, and manage his business, he being old and feeble, he would compensate him for his sacrifices and expenses, etc., incurred in this matter. Pursuant to this agreement, he sold out his personalty at $500 less than it was worth, and returned to said plantation at an expense of $600, and took charge of

and controlled his father's business. In consideration of the premises, the father agreed to convey to Warren lot number thirty-one, in the twenty-fifth district of said county, in fee simple. The deed was not made, but pursuant to said contract Warren took possession of said lot and put improvements on it, costing him $500. William Brown suddenly died in July, 1858, testate, on his death-bed recognizing said trade and urging Shropshire to see that Warren should have a perfect title to said lot. Warren and his family lived on said lot from 1857 till 1863, when Warren died intestate, leaving complainant and one child him surviving. He had fully complied with his promise. She and her child still live on said lot, and yet Shropshire and Ward refuse to make a deed pursuant to said contract. She prayed that they be compelled to do so.

Shropshire filed no answer. Ward answered, denying said agreement *toto coelo*. An action of ejectment had been brought against complainant for said lot, and that case and the bill were tried together.

Shropshire testified, that early in 1857 he wrote a will for William Brown, before Warren came back to Georgia, but this will was not executed till about ten days before William Brown died. By it all his realty was given to his wife during her life, remainder to all of his children. He was then about sixty-five years old. Two days before he died, he sent for Shropshire, told him Warren had come to wait on him in his old age and had spent $600 in coming, and he wished him to make Warren a perfect title to said lot. (Several other witnesses testified to the same wish as then and at other times expressed by William Brown). After William Brown's death, his mother conveyed her life-estate in said lot to him, and afterwards, in the fall of 1858, Warren rented said lot from the executors, though he said it was his own. The letter alluded to was read in evidence, but contained nothing about his return but these words: "I was expecting you here and hope you will yet be able to come. Write to me immediate-

ly after you receive this, and write whether you can come or not, for I will want to make arrangements for the next year. If you can come, write to me what time you will be here. Your mother wants you to come very much." It was written the 28th of September, 1857.

A witness testified that Ward had said to him that he did not doubt but there was some such understanding as that averred, but that there was no writing, and, therefore, it would not hold. These witnesses testified also to the soundness of William Brown's mind when he made said declarations and request. Upon the conclusion of complainant's evidence, defendants moved for a non-suit, which the Court refused. The defendants put in evidence said will, showed that Warren had held the land as their tenant, and introduced several witnesses who gave facts to show that William Brown was not of sound mind for many days before his death, etc. One witness testified that Warren told him that he took a "wild-goose chase" through Arkansas and Texas, got back to Memphis, took a notion to return to Georgia, and came back unexpectedly to his father. There was no evidence as to the value of the lot.

The charge of the Court is sufficiently stated in the opinion. The jury found for the complainant. A new trial was moved for on various grounds and was refused. That is assigned as error.

WILLIAM H. DABNEY, for plaintiffs in error.

J. W. H. UNDERWOOD, for defendant.

WARNER, Chief Justice.

This was a bill filed by Mary A. Brown, administratrix of Warren Brown, against the executors of William Brown, deceased, to compel the specific performance of a parol contract for the sale of lot of land number thirty-one, in the twenty-fifth district of Chattooga county, alleged to have

been made between the complainant's intestate, Warren Brown, and the defendant's testator, William Brown.

On the trial of the case, the jury found a verdict for the complainant, decreeing a specific performance of the alleged contract. A motion was made for a new trial on several grounds; but the principal ground insisted on was that no contract was proved which would entitle the complainant to a decree for a specific performance of it, which motion was overruled and the defendants excepted. The answer to the complainant's bill denies the alleged parol contract. The testator, William Brown, made his will about ten days before his death, and devised his land, including the lot in controversy, to his wife during her life, and, at her death, to be sold and equally divided between his children named therein, one of whom was his son Warren. The evidence shows that the complainant's intestate was not in the possession of the lot of land until after his father's death. It is claimed that his father, in a letter written to Warren (who then lived in Arkansas), on the 28th September, 1857, requesting him to come and see him and expressing the hope that he would come, induced him to sell out there and move back to Georgia, at a sacrifice of $600; but there is not one word in that letter about any contract for the sale of the land to him. It is shown, by the evidence, that he came to his father's and lived there until his father's death, and that his father said to Shropshire and others a day or two before his death, "that his son Warren had come here to wait on him in his old age, and spent $600 to come, and he wanted to make him whole, and wanted Shropshire to see that his son Warren have a good title to his lower lot of land—a title they can't jostle him in." Kirby states that Ward, one of the executors of William Brown, in a discussion with him about his defense, said "that he had no doubt some understanding, as is stated in the bill, existed between the old man Brown and his son Warren, but Warren had no writing and his wife and children could not hold it." This is substantially the evidence in

the record to prove the parol contract for the sale of the land by William Brown to his son Warren, which it is sought to have specifically performed. To entitle the complainant to a decree for a specific performance of the alleged parol contract between William Brown and Warren Brown, for the sale of the lot of land, the contract must first be established with reasonable certainty, and the consideration claimed to have been paid or rendered must be clearly proved to have been paid or rendered in pursuance of that contract. The consideration claimed to have been paid by the complainant's intestate for the lot of land, was the damage and loss of $600, sustained by him in removing from Arkansas to Georgia, to attend to his father's business. Whether that sum was a full and adequate consideration for the lot of land the record does not inform us, as it contains no evidence of the value of the lot alleged to have been contracted for. The counsel for the defendants requested the Court to charget he jury, "that it does not require as much evidence to defeat a specific performance of a contract as it does to rescind a contract executed, and inadequacy of price or consideration may justify the Court and jury in refusing to decree a specific performance." The Court qualified the request by adding, "If such as to induce the jury to suspect imposition or fraud; when the contract is between father and son, that fact may be considered for what it is worth, in connection with the amount of consideration, and all the other facts and circumstances to enable you to determine whether this contract was fairly and *bona fide* made and obtained, if made at all." This qualification of the request by the Court to charge the jury was error, and especially so, in view of the facts of this case, there being no evidence of any fraud or imposition practiced upon the complainant's intestate. The increased value of land, resulting from the altered condition of our people, admonishes us that the well established principles which govern Courts of equity in decreeing the specific performance of parol contracts for the sale of real estate, ought not to be relaxed. In our

judgment the evidence disclosed in this record does not establish such a parol contract for the sale of the lot of land in controversy, as would authorize the Court and jury to decree a specific performance of it, according to the well recognized principles by which Courts of equity are governed and controlled in such cases.

Let the judgment of the Court below be reversed.

THE SELMA, ROME AND DALTON RAILROAD COMPANY, plaintiff in error, *vs.* H. M. CAMP, defendant in error.

1. In the assessment of damages to the owners of property, caused by the location and use of a railroad, the actual damage resulting directly from an invasion of their rights of property by the railroad company, is the measure of damages to be rendered.
2. When a railroad company institutes proceedings, under the provisions of their charter, against one as the owner of land, who is in possession thereof, for the assessment of damages for taking the land for the use of the road, such recognized owner will not be required to prove his title to the land at the time of the trial.

Evidence. Damages. Before Judge HARVEY. Floyd Superior Court. January Term, 1871.

This cause is sufficiently reported in the opinion, which was delivered from the bench.

PRINTUP & FOUCHÉ, for plaintiff in error. Under the company's charter, the fee of right-of-way passes to it upon its paying the damages: Acts of Ala., 1851–2, p. 344; Acts of Ga., 1865–6, pp. 207, 210; Acts of 1866, p. 124. Therefore, Camp must show title in himself: 1 Redfield, 270, and note, 347 (9;) 5 Wendell, 423, 452; 6 Wis. R., 636. The damages are too remote: 1 Redfield, 343; 23 Ga. R., 402; 28th, 46.

WRIGHT & FEATHERSTON, for defendant in error. Damages to mill not too remote, for the Act provides remedy for

damages "to lands or other property through or near which" the road may pass: 56 Penn. St. R., 460; 2 Ad. and Ell., (U. S.) 347; 2 B. and S. R., 617; 10 Ire. C. L. R., 46; 51 Maine R., 318. Such damages are actionable without the charter: R. Code, secs. 2947, 2970, 740, 741, 3196; 1 Redf. on Railways, 334. Camp's title not in issue: 1 Redf. on Railways, 372. He could recover, notwithstanding his sale of the mill: 1 Redf. on Railways, 375 (5,) 348 (11;) 17 Ga. R., 40; 15 Pick R., 206.

WARNER, Chief Justice.

1. This case came before the Court below on an appeal from the assessment of damages, under proceedings instituted by the Selma, Rome and Dalton Railroad Company, under the provisions of the charter of the company, to ascertain the damage done to H. M. Camp, of the county of Floyd, by the location of the railroad on his land. On the trial, the jury found a verdict for $500. A motion was made for a new trial, on the part of the railroad company, which was overruled, and the company excepted. The evidence is, that five acres of land was taken by the company, worth $125; the other damage done to his property is proved to have been $250, making the entire actual damage sustained $375. It is true that the plaintiff states that his mill, which is located on another tract, about two hundred yards from the railroad, was injured $600, but in what manner the location of the road injured it is not stated, except the loss of custom, and that it cost him $1,100, and he has sold it for $400. Nelms, the miller, testifies, that the custom to the mill decreased about one-half after the railroad was built, and that Camp sold the mill before the road was finished, but after the grading and change of the mill-road. The damage done to the mill, for which the plaintiff is entitled to compensation, is the actual damage done to his property by the location and use of the road, resulting directly from an invasion of his property by the railroad company.

2. If the plaintiff had instituted a suit against the company for an invasion of his free-hold estate, then he might have been required to prove a title to his land, but as the railroad company originated the proceedings against him, as the owner of the land, to assess the damages for the right-of-way, under their charter, and he being in possession of the land, and recognized by the company as the owner thereof, it was not incumbent on him to prove his title to the land at the trial. In the view which we take of this case, our judgment is, that the judgment of the Court below should be reversed, unless the plaintiff shall consent to write off from the verdict the sum of $125, so as to leave the sum of $375 as the amount of the verdict, and in the event he shall consent to do so, that the judgment be affirmed for that amount.

Let the judgment be entered accordingly.

J. C. RAWLINS, plaintiff in error, *vs.* MARY A. SHROPSHIRE, defendant in error.

1. The Statute of Frauds requires that any contract for the sale of lands or any interest in or concerning them, must be in writing, signed by the party to be charged therewith, or by some person by him lawfully authorized; but the Statute of Frauds does not extend to cases where the contract has been *fully executed*, or where there has been performance on one side, accepted by the other, in accordance with the contract.
2. Full payment alone accepted by the vendor, if clearly proved with reference to the parol contract, will be sufficient part performance to justify a Court of equity to decree a specific performance of such parol contract for the sale of land.
3. To allow the vendor of the land or his legal representatives to retain the land and the purchase-money paid therefor, as against the vendee and those claiming under him, would be a fraud upon the latter which a Court of equity will not permit or sanction.

Ejectment. Equity practice. Before Judge PARROTT. Floyd Superior Court. July Term, 1872.

In the opinion of the Court, delivered from the bench, will be found all the facts necessary to an understanding of the points decided.

ALEXANDER & WRIGHT; SMITH & BRANHAM, and DUNLAP SCOTT, for plaintiff in error. Parol contract for land, executed, will be enforced: Revised Code, secs. 1940, 1941, 2488, 2152 to 2167 inclusive; 2170, 2813, 2814, 3130 to 3136 inclusive; 30 Ga. R., 96; 3d, 5. The equity against Shropshire and his representatives was perfect: 3 Ga. R., 5; 12th, 464; 24th, 150; 29th, 17: Cook *vs.* Duer, decided 5th March, 1872. Seven years' acquiescence binds widow and children: Revised Code, section 2166; 32 Ga. R., 80. The decree should follow the verdict: Revised Code, secs. 3026, 3027, 3514, 4154; Borum *vs.* Thweatt, March 5th, 1872.

UNDERWOOD & ROWELL; WRIGHT & FEATHERSTON, for defendant.

WARNER, Chief Justice.

On the 12th day of June, 1869, the heirs-at-law of F. C. Shropshire brought an action of ejectment against J. C. Rawlins to recover the possession of a tract of land in the county of Floyd, containing twenty-seven and one-half acres, being the place whereon F. C. Shropshire formerly resided. The plaintiffs are the widow and children of F. C. Shropshire. When the case was called for trial the defendants made a motion for a continuance, on the ground that they desired to file a bill on the equity side of the Court to bring other parties before the Court, and set up certain equities against the plaintiff's right to recover in the action of ejectment, stating to the Court the facts which constituted their equitable defense. The Court overruled the motion, on the ground that under the existing laws of this State new parties could be made, and the rights of all could be settled on equitable principles in the present action. The defendant then amended his plea,

setting forth his equitable grounds for relief, and the Court granted an order making Wesley Shropshire, administrator of F. C. Shropshire, a party plaintiff, and also making J. P. Hults, through whom defendant claimed title, a party defendant. The cause then proceeded to trial, when the following facts, in substance, were proved as disclosed by the record. In the summer of 1862, F. C. Shropshire, a short time before he left home to enter the Confederate service, told the witness, Johnson, that he was then preparing to enter the service, and needed all the money he then had, but said he had put his place (the property in dispute) in the hands of Mr. Stevens, for sale, and, so soon as he made sale of it, would then be able to pay all his debts; said he could not pay his debts until the property was sold; requested the witness to assist Stevens in the sale of it, and if he could find any one wishing to purchase to send them to Stevens; said his price for the property was $5,000.

On the 18th of November, 1862, Hults purchased the property of Stevens, as the agent of F. C. Shropshire, and paid him therefore the sum of $5,000 in cash. The money was raised by calling in loans made previous to the war, receiving the Confederate money paid for the land from his debtors as gold, dollar for dollar. Shropshire was living at the time of the purchase of the property, but died shortly afterwards, before a deed was executed. Stevens, the agent, is also dead. After the sale of the property by Stevens to Hults, Mrs. Shropshire, the widow and her children, vacated the premises, and Hults took possession of it under the purchase from Stevens, as the agent of Shropshire, on the 1st of March, 1863, and continued in possession of it until 1866, when he sold it to Cleaves for $5,000 cash. Shortly after the death of F. C. Shropshire, his father, Wesley Shropshire, became the administrator on his estate, and executed a bond to make a title to the property in which it is recited: "Whereas, Francis C. Shropshire, in his lifetime, by his agent, J. R. Stevens, did sell the place where he resided near Rome, Geor-

gia, for the sum of $5,000." This bond is dated on the 26th December, 1862, when all the facts relating to the sale of the property may fairly be presumed to have been well known to the parties interested. On the 31st of October, 1866, Wesley Shropshire, the administrator, made a deed to the property to Cleaves by the consent of Hults, who had sold the property to Cleaves. In this deed it is recited that, "Whereas, Francis C. Shropshire did, in his lifetime, by his agent, J. R. Stevens, sell his residence near Rome, and the lands thereunto belonging, being about twenty-seven and a half acres of land, and did then depart this life intestate without executing title thereto, and afterwards the said Cleaves did pay me, the administrator of the said Francis C. Shropshire, the purchase money to-wit, $5,000, which I was enabled to apply to the payment of the debts of said estate."

This deed was written by Judge Wright, the father of Mrs. Shropshire and the grandfather of her children, who are the plaintiffs in the ejectment suit, and was executed by the paternal grandfather of the children. Hults swears that the deed was prepared by Judge Wright and handed to him by Judge Wright, who assured him the deed was good and conveyed a perfect title to Cleaves. Judge Wright, who was examined as a witness, admits writing the deed, but denies telling Hults the title was good. Hults asked him to write the deed and paid him for writing it. The reason why the deed was made direct to Cleaves instead of to Hults was to save stamps. Wesley Shropshire, who was examined as a witness, states that Judge Wright advised him to accept the money and pay Francis' debts; that he has paid all the debts with the money except one. In his return to the Court of Ordinary, Wesley Shropshire charges himself with the following receipt: "Received December 26th, 1862, of J. R. Stevens, $5,000 in full for the purchase of F. C. Shropshire's house and lands on the Calhoun Road, one and one-fourth miles from the city of Rome, Georgia. Wesley Shropshire,

administrator of F. C. Shropshire, deceased." The original receipt was read in evidence and proved to have been written by Judge Wright, (as well as the bond,) who was the legal adviser of the administrator. The return also shows the payment of debts of F. C. Shropshire to the amount of $4,750. No other property belonging to the intestate's estate except the $5,000 mentioned in the receipt to Stevens for the proceeds of the sale of the premises in dispute, appears in the returns of the administrator to the Court of Ordinary. In December, 1868, Cleaves sold the property to Rawlins for $6,000, who made valuable improvements on it worth $1,200. Cleaves was dead at the time of the trial.

There is other testimony in the record, but the foregoing recital embodies the main facts which must control our judgment. The jury, after hearing the charge of the Court, returned the following verdict: "We, the jury, find for the plaintiffs the premises, together with $1,452 for rents; and find for the defendants $5,000 and interest on the same from the 18th day of November, 1862, to date, and in addition thereto the sum of $1,200, and interest on that amount from the 27th day of July, 1864, for improvements, and plaintiffs to pay the costs of suit. This 27th July, 1871. Eben Hillyer, foreman." On this special verdict of the jury the Chancellor ordered the following decree to be entered: "It is ordered adjudged and decreed by the Court, that the said heirs of Francis C. Shropshire do recover of the said J. C. Rawlins and his tenants the premises in dispute, and that the Clerk do issue the usual writ of possession for said premises after the expiration of thirty days from this date, and that the rents be set off against the improvements as the value of the improvements made by Rawlins, and interest thereon just equals the rents. And that John P. Hults do recover of Wesley Shropshire, as the administrator of Francis C. Shropshire, deceased, the sum of $5,000 principal, and the sum of $3,042 07 interest to date; and that the defendants recover of plaintiffs the sum of ..... dollars, costs of

suit. August 9th, 1871. J. R. Parrott, Judge, presiding." This decree is excepted to, and also the charge of the Court to the jury is excepted to. If we are to consider this case as being tried, according to the well established principles which govern Courts of equity in enforcing the specific performance of parol contracts for the sale of land, then there was manifest error in the charge of the Court to the jury, but the charge of the Court does not appear to have hurt the defendants, for the jury, notwithstanding the errors in the charge of the Court, have returned an equitable verdict. The effect of their verdict is the enforcement of the parol contract made between Hults and Stevens, as the agent of F. C. Shropshire, for the sale of the land. It is true the jury, in the exercise of their discretion, have decreed the land to the plaintiffs, but they have decreed, at the same time, that Hults, or those claiming under him, are entitled to be first paid the purchase-money which the ancestor of the heirs received for the sale of the land, and which has been applied to the payment of his debts. This is a very crafty, subtle attempt to appropriate the money for which the land sold to the payment of the debts of the intestate, and thus protect the property from the payment thereof for the benefit of the heirs, under the *strict forms of law*, contrary to the principles of equity and good conscience. What equity or justice is there in making Shropshire, the administrator, pay the $5,000, with the interest thereon, when it has been applied by him, in good faith, to the payment of the debts of the intestate? The heirs of the intestate were not entitled, either in law or equity, to inherit his property until the debts due by him were first paid. There can be no doubt, from the evidence in the record, and the conduct of the parties interested in the sale of this property, that Stevens was the agent of F. C. Shropshire to sell it, and that he did sell it during the life of Shropshire, and received therefor the sum of $5,000 from Hults, the purchaser, which sum of $5,000 (less Stevens' commissions) was paid over to his administra-

tor and applied by him in payment of the intestate's debts. These are the plain, naked facts of the case.

It is true, there is no evidence of any written authority from F. C. Shropshire to Stevens to sell the land, and it is also true that no deed was made by Shropshire or his agent during his life, but his legal representative received the purchase-money and applied it for the benefit of his estate. How stands the equities between the purchaser of the land and those claiming title under him, and the heirs of the intestate? But for the money paid by the purchaser for the land, the land would have been taken to pay the intestate's debts. Shall the heirs of the intestate hold and enjoy the land without paying back to the purchaser of it the amount he paid, and which was applied to the payment of the intestate's debts to enable them to enjoy it? Shall the heirs of the intestate have the land and the money paid by the purchaser of it without refunding to him the money paid for their benefit? If their is any equity or justice in that, we are unable to see it. If F. C. Shropshire, while in life, had made a parol contract with Hults for the sale of the land, and had received the consideration therefor, a Court of equity would have compelled a specific performance of it.

Full payment alone accepted by the vendor, if clearly proved with reference to the parol contract, will be sufficient part performance to justify a decree. Code section 3131. The statute of frauds requires that "Any contract for the sale of lands, or any interest in or concerning them, must be in writing, signed by the party to be charged therewith, or by some person by him lawfully authorized." But the Statute of Frauds does not extend to cases where the contract has been *fully executed*, or where there has been performance on one side, accepted by the other, in accordance with the contract: Code, sections 1940, 1941. The parol contract in this case for the sale of the land was made by Shropshire through his agent, Stevens; the purchase-money for the land was paid by Hults and accepted by Shropshire's

agent for him. There was a performance on one side and an acceptance by the other, in accordance with the contract, and it would be a fraud on Hults, and those claiming under him, not to compel a specific performance of the contract which the jury, by their verdict, have done in this case. The verdict of the jury is in accordance with the well established principles by which Courts of equity are governed, in decreeing the specific performance of parol contracts within the Statute of Frauds. We, therefore, affirm the verdict of the jury, and reverse the decree made by the Chancellor upon that verdict, and award the following judgment in this case.

It is considered, ordered and adjudged by the Court that the special verdict rendered in this case be affirmed, and that the decree made thereon, signed by the Chancellor, as set forth in the record, be reversed, vacated and set aside, and that the Chancellor do make and sign the following decree upon said verdict: The jury in the above stated case, after hearing the evidence submitted to them under the pleading set forth in the record, returned the following special verdict: "We, the jury, find for the plaintiffs the premises, together with $1,452 for rents; and find for the defendants $5,000 and interest on the same from the 18th of November, 1862, to date; and in addition thereto, the sum of $1,200, and interest on that amount from the 27th of July, 1868, for improvements, and plaintiffs to pay the cost of suit. This 27th July, 1871. Eben Hillyer, foreman."

It is therefore ordered and decreed by the Court, that the plaintiffs do have and recover the premises described in the record on the payment of the sum of $5,000, with interest on the same from the 18th day of November, 1862, up to the 27th day of July, 1871, to the defendants within sixty days after the date of this decree; and that the sum of $1,200, together with the interest on that amount from the 27th day of July, 1868, up to the 27th day of July, 1871, for improvements, be set-off against the sum of $1,450 found for

the plaintiffs for rents, and that the plaintiffs do pay the costs of suit to be taxed as required by law.

JOSEPH HUMPHREYS, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. When upon a review of the evidence and the entire record of the trial of the case, there is no material error which could have produced a different result, a new trial will not be granted, especially where the verdict is sustained by the evidence.
2. The law of insanity, as laid down in Choice *vs.* The State, 31st Georgia Reports, pages 472, 475, 477 and 478, affirmed. (R.)
3. The verdict was not set aside, though there was an error in the charge of the Court. (R.)

Criminal Law. Insanity. Before Judge PARROTT. Bartow Superior Court. March Adjourned Term, 1871.

Joseph Humphreys was indicted for murdering William Humphreys, in June, 1871, by shooting him with a gun. The evidence for the State showed the following facts: Joseph Humphreys married the daughter of one Burgess, and by her had said William Humphreys. They were poor and lived all in one room of a house. About fifty yards from this house lived Mr. Kitchens, and near by another family. In the last mentioned family was a sick child, and for a week before the killing Mrs. Humphreys and Kitchens had been sitting up with this child, but not sitting up together. Kitchens frequently visited at Burgess' but never stayed all night till on the night of the killing. On that night Burgess and his wife, Kitchens, Mrs. Humphreys and William, then eleven years old, all slept on the floor of said room. Burgess was near the window, Kitchens under the table, and Mrs. Humphreys next to the wall, on the opposite side from Burgess, and about eight feet from Kitchens, and at her feet was William. Where Joseph Humphreys was during the

night does not appear. He saw a man standing in the door of the house the evening before, and the man ran up as if he would shoot him, but upon seeing who it was, ran away. About daylight Mrs. Burgess got up and threw open the window to throw out some water. Burgess was awake, the others asleep. Joseph Humphreys, as the window was thrown open, poked an army musket in and shot it; the load lodged in the back of William, who cried out that his father had shot his back all to pieces. Joseph dropped that gun and picked up another, and fired it into the room, but did not hit any one with it. The window was about waist high. Kitchens was so soundly asleep that the firing did not wake him. Joseph ran and was caught. His son, William, died in about three hours. It was also shown that about six months before this, Humphreys had said his wife was unfaithful to him, and that Mrs. Burgess was encouraging her in it, and that he would kill them all, and that he did try to kill her with a knife and an axe.

The defense undertook to show that he was insane from jealousy of his wife. Several witness testified that he was very weak minded, and had no education; one said he thought him crazy, and several said he had not as much sense as most boys of ten years of age have. They also testified that he had frequently charged his wife with infidelity to him, detailed to them circumstances of suspicion which led him to believe that she had been improperly intimate with one Jones, where he, Humphreys, formerly lived, and certain circumstances which made him conclude that she was unfaithful to him yet. But there was no evidence of any improper conduct on her part.

In rebuttal, many witnesses who had known Humphreys for many years, testified that while he was not bright, he could attend to ordinary work intelligently, and they believed him to be sound in mind, at least sufficiently so to know right from wrong. Among these was a physician, who examined him in jail and pronounced him sane.

In charging the jury the Court read from Choice *vs.* The State, 31 Georgia Reports, page 472, as follows: "These are the rules for determining the question of insanity, and the degree and nature of irresponsibility to the law. The law presumes every man of sound mind till the contrary appears. The burden of proof is on the defendant, that, at the time, of the commission of the act, he was not of sound mind, and it ought to be made to appear to a reasonable certainty to your satisfaction, that at the time of the commission of the act, the party did not know the nature and quality of the act, or if he did, did not know that the act was wrong; and it devolves upon you to decide whether the defendant has, by proof, rebutted this legal presumption of sanity. If, after mature deliberation, you are satisfied beyond a doubt that the prisoner is guilty, you will find him so; if not, you will find him not guilty."

Reading from the same case from pages 475, 477 and 478, he further charged as follows: "If a man has capacity and reason sufficieut to enable him to distinguish right and wrong as to the particular act in question; if he has knowledge and consciousness that the act he is doing is wrong, and will deserve punishment, he is, in the eye of the law, of sound mind and memory, and therefore criminally responsible for his acts."

Question 1. What is the law respecting alleged crimes committed by persons afflicted with insane delusions with reference to one or more particular subjects or persons; as for instance, when at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with the view and under the influence of some insane delusion of redressing or avenging some supposed grevance or injury, or of procuring some supposed public benefit?

Answer. The opinion of the Judges was, that notwithstanding the party committed a wrong act while laboring under the idea that he was redresing a supposed grievance or injury,

or under the impression of obtaining some private or public benefit, he was liable to punishment.

Question 2. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusions respecting one or more particular subjects or persons, is charged with the commission of a crime, murder for example, and insanity is set up as a defense?

Answer. Before a plea of insanity should be allowed undoubted evidence ought to be adduced that the accused was of diseased mind, and that at the time he committed the act he was not conscious of right and wrong. Every person was supposed to know what the law was, and therefore nothing could justify a wrong act except it was clearly proved that the party did not know right from wrong.

Question 3. If a person under an insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused?

Answer. If the delusion was only partial, the party accused was equally liable with a person of sound mind. If the accused killed another in self-defense he would be entitled to an aquittal; but if the crime were committed for any supposed injury he would be liable to the punishment awarded by the laws to crimes.

The Court also read to the jury section 4259 of the Revised Code, as to voluntary manslaughter and said: "Does the evidence show that there was some actual assault upon Joseph Humphries, or an attempt by William Humphries, the person killed, to commit a serious personal injury upon the person of Joseph Humphries, or did he commit any other offense or do any act equivalent to an assault, to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied?"

The jury found the prisoner guilty. His counsel moved for a new trial because the verdict was against the weight of the evidence, etc., and because the Court erred in each section

of said charge. The Court refused a new trial and that is assigned as error.

W. H. DABNEY; R. W. MURPHY; J. C. BRONSON, for plaintiff in error.

C. E. BROYLES; Solicitor General, by I. E. SHUMATE, for the State.

WARNER, Chief Justice.

The defendant was indicted for the crime of murder, and found guilty by the jury. A motion was made for a new trial, which was overruled by the Court, and the defendant excepted. There was no error in the charge of the Court in relation to the insanity of the defendant, according to the repeated rulings of this Court. In our judgment, the weight of the evidence contained in the record was in favor of the sanity of the defendant.

Although there may have been error in the charge of the Court as to the assault of the deceased upon the defendant (there being no evidence of any such assault), still, that error would not be sufficient to set aside the verdict in view of the facts of the case. The theory of the defendant's counsel is, that the defendant was jealous of his wife, and, knowing that Kitchens was in the house of his father-in-law where his wife was staying, intended to shoot him, and by mistake, shot his son, and was therefore guilty of manslaughter only; that he acted from a sudden impulse of passion, arising from jealousy of his wife. There is no evidence of any improper intimacy between Kitchens and the defendant's wife at any time, which would authorize the defendant to be jealous of him. The family were all sleeping on the floor in the only room of the house (being poor people), when the defendant, about day-light, pointed his gun through the window and shot his son, who was covered with a quilt. It is true Kitchens was there also, sleeping on the floor with the rest of the

family of Burgess, six or eight feet from defendant's wife—her father, mother and son being in the same room. After reviewing the evidence in this case, and the charge of the Court to the jury, our judgment is, that there is no error in the record which will authorize this Court to interfere and set aside their verdict.

Let the judgment of the Court below be affirmed.

CALEB KING, executor, plaintiff in error, *vs.* JOHN M. KING *et al.*, defendants in error.

A bill in equity may be amended when the *remittitur* from this Court is about to be made the judgment of the Court below, and before it is entered on the minutes of that Court.

Res adjudicata. Equity practice. Amendments. Before Judge PARROTT. Gordon Superior Court. April Term, 1871.

The children of Jonas King, deceased, filed a bill against Caleb King, as executor of their grand-father, Jonathan King, to recover from him their father's share in said Jonathan's estate, without averring when their father died. The bill was demurred to for want of equity, and the demurrer was sustained and the bill was dismissed. At January Term, 1871, this Court affirmed the judgment upon the ground that complainants had no right to the relief prayed for, unless their father died during the life of their grand-father.

At April Term, 1871, of said Superior Court, before the *remittitur* from this Court had been filed, they moved to amend said bill by averring the date of their father's death, so as to show that he died during their grand-father's lifetime. Caleb King's counsel objected, upon the ground that until the *remittitur* was filed there was no cause pending in the Superior Court to amend, and that when said *remittitur*

should be so entered and made the judgment of the C the bill would be finally dismissed. The Court allowe amendment of the bill and thus kept it in Court. Th assigned as error.

UNDERWOOD & ROWELL by R. FOUCHE, for plaintif error.

A. R. WRIGHT, by FEATHERSTON, for defendants.

WARNER, Chief Justice.

In this case, there was a general demurrer to the comp ants' bill for want of equity, which demurrer was susta by the Court. The case was brought up to this Court the judgment of the Court below was affirmed: See *Kin King*, 42 Georgia Reports, 512. When the *remittitur* this Court was about to be made the judgment of the C below, and before it was made, the counsel for the comp ants made a motion to amend their original bill, and to such a case as would give to the Court jurisdiction. amendment was allowed by the Court, and the defendan cepted. If this was an original question before this C I should hold that when a general demurrer had been to a bill for want of equity, and that demurrer had sustained by the Court below and affirmed by the judg of this Court, without any directions as to the amendme it, the bill would be out of Court and could not be ame so as to keep it in Court, when the judgment of this C was about to be made the judgment of the Court below the case of *Sullivan, Cabot & Company vs. The Rome I road Company*, 28 Georgia, 29; and the case of *Cothra Scanian*, 34 Georgia Reports, 555, decide that an amendi may be made at that stage of the case, and, upon the aut ity of these two cases, we affirm the judgment of the C below.

Judgment affirmed.

WILLIAM T. RUSSELL, plaintiff in error, *vs.* WILLIAM F. MCCARTY *et al.*, defendants in error.

Duress which will avoid a contract must consist of threats of bodily or other harm, or other means amounting to coercion, or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will.

Contracts. Duress. Before Judge HARVEY. Whitfield Superior Court. October Term, 1871.

The facts of this cause are sufficiently full in the opinion of the Court, delivered from the bench.

MCCUTCHEN & SHUMATE, for plaintiff in error.

J. A. R. HANKS, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants on a promissory note for $113, payable to the plaintiff. The defendants alleged in their plea that the note was executed under duress. On the trial the jury found a verdict for the defendants. A motion was made for a new trial on several grounds specified in the record, which was overruled by the Court, and the plaintiff excepted. The evidence shows that in the fall of 1864 McCarty, the principal maker of the note, was in the Confederate service in Tennessee, that he was one of a squad of ten men who were surprised by the Federal army and lost their horses, that Captain Abbott, who was in command of the squad, advised them to mount themselves as best they could, that he took a horse from the stable of one Wommack, and rode him off. After the surrender, in 1865, he was told by one Cook that Wammack had threatened to prosecute him for taking his horse, when he gave his note to Wammack for the horse rather than be prosecuted. Wommack traded the note to Russell, the plaintiff, for cattle, in December, 1867. Plaintiff presented the note to McCarty, in January or February, 1868, in this State, where he

resided, for payment, who said he was sorry plaintiff had traded for the note, had not intended to pay Wommack who lived in Tennessee, but as plaintiff could collect the note in this State, if he would give him a few months' time he would give him a new note, with security, which was done, and that is the note now sued on.

Duress which will avoid a contract must consist of threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will: Code, 2595. The evidence contained in this record is not sufficient, in law, to avoid the payment of the note on the ground of duress.

Let the judgment of the Court below be reversed.

GILES JACKSON, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

(BY TWO JUDGES.)—1. When, on a trial for murder, it appeared that deceased had threatened prisoner's life, whereupon prisoner left the field where the quarrel took place, returned in about twenty minutes and said if deceased was going to whip him, he was now ready for him, and deceased advanced upon him, pistol in hand, upon which prisoner shot and killed deceased, and the jury returned a verdict of voluntary manslaughter, this Court will not disturb the verdict.

2. Provocation by threats will, in no case, be sufficient to free the person killing from the crime of murder or from manslaughter, if the circumstances reduce the homicide to that grade.

3. Where counsel for prisoner consents that the jury may return their verdict to the Clerk, it implies a consent that they may disperse after having done so; and if the verdict so returned is one for "manslaughter," not specifying the grade, it is not error in the Court to order the jury to reassemble and change their verdict to either voluntary or involuntary manslaughter (and the jury do change it to voluntary manslaughter,) unless the prisoner can show that one or more of the jury have been tampered with or that his case has been otherwise prejudiced by reason of the dispersing of the jury.

4. The finding in this case is not contrary to the evidence. 20th February, 1872.

Criminal Law. Before Judge STROZIER. Dougherty Superior Court. December Term, 1871.

Jackson and Horne had a quarrel in the field. When they were quarrelling, Horne advanced upon him with a pistol and threatened to kill him. When Jackson got to the end of his row, he went to the house and got *his* pistol and returned in about twenty minutes. He notified Horne that if he intended whipping him he was ready. Horne again threatened to kill him, and advanced upon him, pistol in hand, and Jackson fired and killed him instantly.

The Court charged the jury that no threats by Horne against Jackson "would excuse prisoner from the offense of murder or manslaughter." When the Court adjourned, counsel consented that when the jury agreed upon a verdict they might hand it to the Clerk. They found a verdict for "manslaughter," handed it to the Clerk and dispersed. When the Court reassembled and learned this, he ordered the jury to reassemble and specify what kind of manslaughter they meant. They reassembled and returned a verdict of voluntary manslaughter.

Defendant's counsel moved for a new trial upon the grounds that the verdict was contrary to the evidence; that said charge was wrong, and that said direction to the jury was illegal. The new trial was refused, and that is assigned as error.

G. J. WRIGHT, for plaintiff in error.

No appearance for the State.

MONTGOMERY, Judge.

1. The facts of this case show a deliberate intention on the part of the prisoner to fight the deceased on account of a previous threat, made some twenty minutes before by the deceased against the life of the prisoner. His remark that if

deceased was going to whip him he was ready for him now coupled with the firing of the fatal shot immediately afterwards, on the prompt acceptance by deceased of the challenge thus thrown out, fully justified the jury in their finding, and the prisoner is fortunate in having escaped the severer penalty prescribed by the Revised Code, section 4445.

2. The obvious meaning of section 4259 of the Code, which provides that, "provocation by words, threats, menaces or contemptuous gestures, shall in no case be sufficient to free the person killing from the guilt and crime of murder," is that homicide shall not, by such means be reduced below murder; and not an implication, that while such provocation etc., shall not free the person killing from the guilt and crime of murder, it may free him from the crime of voluntary manslaughter. Hence we find no error in the charge of the Court.

3. A consent on the part of counsel for prisoner that the jury may return their verdict to the Clerk, implies a consent that they may disperse after having done so; and if their verdict is for "manslaughter," not specifying the grade, it is not error in the Court to reassemble them, and submit the verdict to them again in order that they may specify the grade of manslaughter, unless the prisoner can show that his case has in some way been prejudiced by reason of the dispersion. The case is different from misconduct on the part of the jury pending the trial; that would throw the *onus* on the State of proving that the prisoner's case has not been prejudiced thereby. The verdict is sustained by the evidence.

Judgment affirmed.

JAMES SEYMOUR, plaintiff in error, *vs.* HENRY MORGAN, defendant in error.

(BY TWO JUDGES.)—1. Equity will not interfere to restrain a trespass, unless it affirmatively appears that the damage will be irreparable, or, from the insolvency of the trespasser, or other cause, the remedy at law is incomplete.

2. A sheriff has no authority to put a purchaser of real estate, at a sheriff's sale, in possession, if to do so it is necessary to turn out a purchaser, from the defendant in execution whose title is anterior to the date of the judgment, even though it be true that, for some reason, the judgment was a lien anterior to its date, so that the purchaser gets a good title. 20th February, 1872.

Equity. Trespass. Purchasers at sheriffs' sales. Before Judge STROZIER. Dougherty Superior Court. December, 1871.

Seymour's bill against Morgan made this case: On the 31st of December, 1863, N. W. Collier sold to Ross a certain lot in Albany, and Ross sold it to Seymour, on the 5th of November, 1864, and Seymour continuously thereafter held quiet possession thereof. Wimberly held a *fi. fa.* against Collier, and had said lot levied upon. The sheriff did not describe the lot fully; gave no notice thereof to Seymour or his tenants, and sold the same at sheriff's sale to Henry Morgan for the inadequate price of $100. This *fi. fa.* was levied on the 3d of April, 1869, by Brown, deputy sheriff, and Seymour's agent claimed the property, and thus stopped the sale; but these claim papers were lost, and the sheriff sold the property in 1871, and threatens to put Morgan in possession. Besides, this *fi. fa.* was founded upon a contract made prior to June, 1865, and was therefore subject to be scaled. And this sale occurred, though no affidavit of the payment of taxes was filled as required by the Relief Act of 1870. Besides, he had had possession of said property for four years prior to said levy, and therefore the property was relieved from the lien. Again, after said levy was made, Morgan, who was Wimberly's attorney, ordered

Brown not to advertise and sell said property, and this was, in law, a dismissal of said levy. He prayed that the sheriff be enjoined from putting Morgan in possession. Injunction was temporarily granted.

Morgan answered as follows: Wimberly obtained said judgment as trustee for certain persons who were minors at the date of the judgment, and therefore the Relief Acts as to affidavits, etc., did not apply. This judgment was obtained in 1861; was appealed from, and the appeal was dismissed in 1866. He ordered the levy made as plaintiff's attorney. No claim was filed, but the sale did not occur, because it was prevented by a bill in equity by one Cargile *vs.* Crawford. As soon as this cause was disposed of by the Supreme Court the *fi. fa.* was turned loose, and he ordered the sheriff to proceed on said levy. The sheriff did proceed, and he bought the property fairly at sheriff's sale without notice of any difficulty in the premises. He charged that Seymour did have notice of the levy, and that it fully described the property. Upon the coming in of this answer he resisted the extension of said injunction. At the hearing, Seymour's agent swore that he had filed a claim against said levy of April, 1869; but the sheriff made affidavit that that claim was to other property of Seymour's, levied on by other *fi. fas.*, and the sheriff also swore that he gave said agent notice of said intended sale, but he admitted that no notice was given at the time of the levy, saying he did not give it because no one was then in possession. It further appeared that when the sheriff was about to sell said land, it was announced by Seymour's friends that the land was his, and that whoever bought it would buy a law-suit; that Morgan told the sheriff to go on and bid off the property.

The Judge refused to continue the injunction, upon the ground that the equity of the bill was sworn off. That is assigned as error.

Vason & Davis, by Clark & Goss, for plaintiff in error.

H. MORGAN, by S. B. SPENCER, for defendant.

McCAY, Judge.

We affirm the judgment in the case, on the sole ground that the complainant has not made out a case for equitable jurisdiction. He has a good remedy at law, and equity will not interfere. At common law a purchaser of real estate only gets the defendant's title. The sheriff was not authorized to put him in possession, as our Code, section 3601, only authorizes the sheriff to turn out the defendant, his heirs or their tenants, or assignees *since the judgment.* It appears plainly in this bill, that the present owners of this land, though they are assignees of the defendant, are not assignees *since the judgment,* and the sheriff has no right to turn them out by notice of the sale. If he does so he is a trespasser, and every remedy will lie against him and those he puts in possession that will lie against any other trespasser.

It would be giving very extraordinary power to a sheriff's sale to say that the sheriff might put the purchaser in possession by turning out all who cannot set up a good title against the sale. It would be a very short way to change the possession in case of a dispute about the title. The statute is the rule. The sheriff may turn out the defendant, his tenants and his assignees, since the *judgment;* further than this he cannot go. The fact that the lien of this judgment dates back does not help the case. One buying land after a judgment against the owner which has been vacated by an appeal, buys it with notice and subject to the final judgment, but he is no more a purchaser after the judgment than one who buys with notice of the vendor's lien or with notice of any other fact which will make the land subject to a judgment against his vendor.

What may be the real rights of these parties, is not now before us, and we give no opinion on the subject. We therefore simply say, that under the facts as they are stated, Seymour does not stand as an assignee of the defendant in

the *fi. fa. after the judgment*, and cannot be turned out of possession by the sheriff in the summary way proposed, even though the purchaser at the sale may prove to have the superior title.

Judgment affirmed.

EDWARD S. ROWLAND, plaintiff in error, *vs.* ISAAC COLEMAN *et al.*, defendant in error.

(BY TWO JUDGES.) An assignment by one, insolvent at the time, to one creditor, to the exclusion of others, and providing for a return of the surplus, after paying the debt to the assessor, is not, since the Act of 1866, in this State, fraudulent upon its face as to other creditors, and a bill alleging no other facts, but merely charging that the said assignment was intended to defraud and delay another creditor, but stating no other facts indicating fraud, is demurrable for want of equity. 5th March, 1872.

Assignment. Equity pleading. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1871.

Rowland, by bill, sought to set aside an assignment made by Coleman and wife to Ransom & Company, averring that said assignment was "made reserving a certain surplus to Coleman, and with the intent to delay and defraud" Rowland—said Ransom & Company knowing such was the object thereof. He averred that this assignment was made pending his suit against Coleman, in which he subsequently had a judgment which is unpaid. The bill was dismissed upon demurrer, and that is assigned as error.

L. T. DOWNING, for plaintiff in error.

CHAPPELL & RUSSELL; FARROW & THOMAS, for defendants.

McCAY, Judge.

Our Act of 1865, 1866, authorizes a debtor in failing circumstances to prefer one creditor to another, in an assignment; and so this Court decided in the case of *Embry vs. Fishcheser*, 38 Georgia Reports, 245. And if this be done, *bona fide*, it does not make the assignment void, if there be more assigned than will pay the debt. The fact that there may be a surplus in the hands of the assignee, after paying the debt, is not of itself sufficient to make the assignment fraudulent, if the assignment be *bona fide*: 27 *Georgia Reports*, 385; 18 *Georgia Reports*, 668; 7 *Georgia Reports*, 275; 1 *Georgia Reports*, 176.

This bill sets up no fact inconsistent with these principles, as attendant upon this assignment. True, there is a general charge that the intent was to defraud, but it is well settled that mere general allegations imputing motives of fraud are not sufficient in any case. There must be facts stated which the Court may see are inconsistent with a fair and *bona fide* intent.

Judgment affirmed.

HENRY C. GREEN, administrator, plaintiff in error, *vs.* W. T. ALLEN *et al.*, defendants in error.

(BY TWO JUDGES.)—1. When an estate is largely insolvent, and there are many creditors of equal degree, fifteen of whom have sued at law, and there are others who have not sued, the administrator may file a bill in equity to marshal the assets, and to compel the creditors to come and prove their debts, and not harrass the administrator with numerous suits. But he cannot join in such bill creditors of higher dignity, whose claims are undisputed; especially if they be judgments, at the death of the testator.

2. In this State a creditor cannot get a preferred lien on the assets of an estate as against other creditors of equal degree by getting the first judgment against the administrator. 5th March, 1872.

Administrators and Executors. Marshaling Assets. Distribution of Estates. Liens. Before Judge JOHNSON. Talbot Superior Court. September Term, 1871.

The bill in this case contained the following averments: Mahone is administrator *de bonis non* of Thomas Green, deceased, succeeding Marshall, administrator, resigned. But for the emancipation of intestate's slaves, by the late war, the assets of the estate would be ample to pay its debts, but now the assets are wholly inadequate. There are some of the demands in judgment, and others are sued upon and will go to judgment at the next term of said Court. Some are not yet sued upon, waiting the result of this bill to marshal the assets. The costs of Court, if these cases proceed, will eat up a large part of the assets. It prayed injunction, and that all the creditors come in and have their demands adjusted, and the assets marshaled and paid according to equity. In 1867 Judge Worrell granted the injunction.

So the cause stood till September Term 1871. Then came Henry C. Green and amended the bill as follows: In April, 1871, Mahone was removed from said administration, and said Henry C. Green was appointed administrator *de bonis non.* Mahone delivered to him the assets of the estate in his hands, consisting of *choses* in action fully described. Mahone owes the estate about $1,200, but he and his securities on his bond are insolvent. Henry C. Green has reduced said *choses* in action, as far as available, to cash, making $2,729 82. During Mahone's administration he sold all the lands of said intestate except certain specified interests in lands, which may swell the assets to $5,000. In part of this land the minor children have applied for a homestead, which application is pending.

There are judgments against the estate amounting to $2,C00, and other demands amounting to $14,000, all fully described and in suit. All of these are founded upon debts contracted prior to June, 1865, and are, therefore, subject to

the Relief Act of 1870. Some of the plaintiffs have filed affidavits as to payment of taxes as required by said Act. Others have filed affidavits as to partial payment of taxes. And others have filed none. The judgment creditors claim that they should be paid in full, while the heirs and other creditors, say said judgments should be, at least, scaled under the Relief Acts. What judgments can be recovered in the pending suits is as yet unknown. He cannot administer said assets without risk to himself and his bondsmen, unless it be done under the direction of the Court of Chancery. Wherefore he reiterates the prayer of the original bill. This bill was dismissed upon demurrer. That is assigned as error.

W. A. LITTLE, for plaintiff in error.

M. BETHUNE; WILLIS & WILLIS; J. M. MATHEWS; E. H. WORRILL, for defendants.

McCAY, Judge.

We think this bill not demurrable. It shews, as it seems to us, a strong case of danger to the administrator if he be left to his legal defense by plea alone. Under our statute, debts have their dignity fixed at the death of the intestate. The administrator has no right to pay one creditor of equal dignity to the detriment of another, nor can one creditor, in case of a deficiency of assets, get the preference of another by getting a prior judgment: Code, 2494.

At common law, the administrator might select among creditors of equal degree, and one of them might get a priority over the others by getting a judgment: Williams on Executors, 886, 894.

The plea of *plene administravit*, or *plene administravit præter*, at common law, was that the administrator had *paid* other debts of equal dignity, or that they had been *reduced to judgment* and were *thus* of higher dignity: Williams on Executors, 1667, 1670.

But under our law, the executor must take the risk. Even if he plead outstanding debts of equal dignity, the truth of the plea may be denied, and he has no means of sustaining his plea except by showing that such *claims* exist; and this would not bind the plaintiff. Suppose the administrator should fail, in a contest between him and one creditor, to show that the claim of another was valid, and judgment should go against him for the full amount of the debt of the suing creditor. In a subsequent suit by the outstanding creditor, this judgment would not protect the administrator. So it might happen that, in such a plea, the administrator might show outstanding debts, and the suing creditor might only get a judgment for a portion of his debt; and yet the administrator might afterwards successfully defend against an outstanding debt.

Where there is a *bona fide* dispute among the creditors as to the rightfulness of their claims, we think equity has jurisdiction to compel them all to come in and settle the dispute, so that the administrator may not be compelled to take the risks we have indicated.

Judgment reversed.

JOHN A. SMITH, plaintiff in error, *vs.* NANCY HUDSON, defendant in error.

(BY TWO JUDGES.)—1. A purchaser of land cannot plead an outstanding title, adverse to that of his vendor, so long as his possession is undisturbed, unless he set up some distinct equity, showing that his remedy on the waranty will be inefficient.

2. The answer of the defendant to the complainant's bill, to enforce his vendor's lien alledging a breach of warranty, and the insolvency of the complainant, there being no claim of solvency in the bill, is not responsive to the bill; and if there be no other evidence, the jury is not bound to notice the statements in the answer as to the solvency of the complainant. 12th March, 1872.

Smith *vs.* Hudson.

Landlord and tenant. Vendor's lien. Equity practice. Before Judge GREEN. Henry Superior Court. April Term, 1871.

Nancy Hudson averred that certain land was set apart to her as dower in her late husband's estate, that his heirs relinquished to her their remainder interest in the land, and then, on the 4th of January, 1855, she sold said land to Smith at $1,000, of which he had paid her but $800; that Smith was of "questionable solvency;" and that she made him a deed to said land (and he remains in possession ever since) without taking security. And she prayed that the land be decreed subject to her vendor's lien for $200 and interest, and be sold to pay it.

Smith denied that he was "of questionable solvency," and that said complainant was insolvent, and admitted all the other averments. But he set up that when he bought the land he supposed her title was good to all except one-seventh of the remainder, and which belonged to the minors of her deceased daughter, from whom she had no relinquishment; that some time after said purchase she had told him that she had made her will, whereby those minors were never to have any part of her estate unless they ratified her sale to Smith; and then believing that seventh was protected, he gave her his note for the $200 unpaid. But he said that before he paid it he found out that the relinquishment of two of the shares which she held was by the husbands of two of her daughters, that they had never reduced this remainder into possession and therefore these said relinquishments did not divest the title of their wives; and therefore he refused to pay the $200. He also pleaded a set-off against said note.

On the trial, Mrs. Hudson testified to the averments in her bill, that Smith was her son-in-law and knew all about the condition of her title when he bought, and that the children of said deceased daughters were now all adult and no one had ever disturbed Smith in his possession, nor was there probability that any one would. Her son also testified that Smith

knew all the facts when he made the purchase. Smith testified to the facts set up by him, except Mrs. Hudson's insolvency. The deeds and note were put in evidence. There was evidence *pro* and *con.*, as to her owing him the debt pleaded by him as a set-off. Defendant's counsel requested the Court to charge the jury, that if complainant, being tenant in dower, conveyed or attempted to convey to Smith the fee in said land (prior to January, 1863), she forfeited her life-estate, and gave the remaindermen a right of entry and action; that if she had but dower in the land and tried to sell the fee, her conduct was illegal and fraudulent, and equity would not assist her in enforcing her contract of sale.

He refused so to charge. He charged, among other things, that if Smith had proven his set-off it should be allowed him.

The jury found for complainant the full amount of her claim, with a lien on the land. Defendant moved for a new trial, upon the ground that the Court erred in refusing to charge as requested, and because the verdict was contrary to said charge and to the law and equity. There was also a ground as to newly discovered evidence, but as it related to the set-off, it is immaterial. The Court refused a new trial, and that is assigned as error.

S. C. McDaniel and George W. Bryan, for plaintiff in error.

George M. Nolan; Doyal & Nunnally, for defendant.

McCay, Judge.

Nothing is better settled than that the vendee of land, with a warrantee of title, cannot plead a want of title in his vendor so long as he is undisturbed in the possession, unless he shows some good reason why his warranty will not protect him; and this for two good reasons: one, that however good

the outstanding title may be, still, it may never be enforced; the other, that he has chosen his remedy by taking the warranty, and he must abide by his own choice.

We do not feel called upon to decide whether this outstanding title is paramount or not. The verdict is right under the evidence in any event. The complainant filed a bill to enforce her vendor's lien for the purchase-money. The defendant sets up an outstanding title in the reversioners, and that the complainant is *insolvent*. Very clearly, this last defense is not in response to any charges in the bill. It fell upon the defendant to prove it. This he utterly failed to do. The answer was on this point no evidence, and there was absolutely no evidence on the point against her solvency. Hence, in any view of the case, the verdict is right. There is no reason shown by the proof why the warranty is not a full protection against the claims the defendant says exist.

It is apparent, too, that this old lady ought to have her money. She has practiced no deception on the defendant. He bought with his eyes open.

Judgment affirmed.

A. F. BURNETT & BROTHER, plaintiffs in error, *vs.* WILLIAM RICH & COMPANY, defendants in error.

(BY TWO JUDGES.)—One renting real estate from another cannot deny the right of the other to rent, so long as he is not disturbed in the possession; and this is true, even if a mere renter let to a third person, the dissent of the landlord not appearing affirmatively. 12th March, 1872.

Landlord and Tenant. Estoppel. Before Judge HOPKINS. Fulton Superior Court. April Term, 1871.

William Rich & Company sued out a distress-warrant for rent against A. F. Burnett & Company. They made affidavit simply that no part of the sum distrained for was due to

William Rich & Company. Thereupon, the case was returned to Court for trial.

On the trial, plaintiffs put in evidence a promissory note for the sum distrained for, signed A. F. Burnett & Company, payable to plaintiffs. It did not appear on its face to be for rent. One of the plaintiffs testified that his firm had rented a store and basement for two years, by written lease, from Angier & Gaskill, and after that term was out, held them, under the old arrangement, for an indefinite time, and while so holding them, rented the basement to defendants for said sum and took their said note therefor, and that their term did not expire during defendants' term. Defendants' counsel moved to dismiss the warrant because, from the evidence, plaintiffs could not have a distress-warrant for rent against defendants.

M. J. CLARK, for plaintiffs in error.

L. E. BLECKLEY; S. WIEL, for defendants.

McCAY, Judge.

We think the argument of the plaintiffs in error, though very ingenious and elaborate, makes entirely too much of section 2253 of the Revised Code. It is not necessary, as we think, in this case to declare exactly how far that section changes the common law idea of a tenant. For myself, I am inclined to think it was only intended to declare that the case there put made a case of the relation of landlord and tenant, and not to say that the relation existed only in such a case.

The facts of this case show that the defendants in the action, in fact, rented their premises from the plaintiffs; that they went into possession *as tenants* of the plaintiff. The common law rule, as well as our Code, section 2257, is that the tenant cannot dispute the title of his landlord. It is no reply to say that he is no tenant. The reason of the rule is that one who goes into possession, under another, shall not be permitted to deny the character in which he went in.

Had the Court, in this case, charged the jury that, if defendant in fact went into possession, recognizing plaintiff as his landlord, he is estopped from denying the relation, would not the jury have been bound, under the evidence, to find for the plaintiff? In other words, if the defendants rented this property of plaintiff, as a landlord, then they are estopped from saying he was not a landlord, whatever may be the truth of the case. We do not say this was not in truth a case of landlord and tenant. We think, as we have said, too much is proposed to be made of section 2253 of the Code, but we decide this case on the ground that defendant is estopped.

Judgment affirmed.

W. P. & F. N. CHISOLM, plaintiffs in error, *vs.* S. B. CHITTENDEN & COMPANY, defendants in error.

1. A mortgage of a stock of goods, under section 1944 of Irwin's Code, cannot, by subsequent purchase and addition of new goods to such stock, be made to cover an amount greater in value than the original stock mortgaged.
2. A levy of a mortgage *fi. fa.* on personal property, more than sufficient in value to pay it off, is *prima facie* a satisfaction. The fact that a large portion of such property was applied by plaintiff and defendant in *fi. fa.*, by way of compromise of the claims of other creditors of defendant, will not affect the right of contesting creditors or claimant to have the *fi. fa.* credited, so far as their rights are concerned, with the value of all the property levied on.
3. Such contesting creditors and claimants are entitled to have the *fi. fa.* credited with the value of the property at the time of levy. Subsequent depreciation, arising from unskillful handling of the goods (by parties other than the contesting creditors or claimants) while under the control of the sheriff or plaintiff, should not be deducted from the amount to be credited on the *fi. fa.*
4. Under the usual issue formed in a claim case, it is not competent for the plaintiff in *fi. fa.* to have an accounting between the claimant and the defendant in *fi. fa.*, and to have the verdict so moulded as to subject to his debt any amount which might be found in the hands of

the claimant, belonging to the defendant, even where such sum may have been paid by defendant to claimant, in part payment for an amount of goods (a part of which are the subject-matter of controversy), which had been sold by claimant to defendant, but which sale claimant had elected to rescind, because of false representations by defendant, at the time of sale; especially when the claimant on his election to rescind the contract, tendered the money received by him to defendant in *fi. fa.*, and which the latter refused. If the plaintiff desires to have such amount subjected to his execution, he must so frame his pleadings as to put the claimant upon notice.

5. False representations made by defendant in *fi. fa.* to claimant, in reference to his pecuniary condition, to induce the claimant to sell him the goods in controversy on credit, are admissible, on the trial of the claim case, to show the contract of sale void, on account of misrepresentation of a material fact.
6. Where claimants were deceived by such misrepresentation, and gave credit to the defendant in *fi. fa.*, on the faith of it, that vitiates the sale, if they elect so to do.
7. If the defendant in *fi. fa.* obtained possession of the goods, under such circumstances, and added them to a stock of goods already mortgaged, the lien of the mortgage will not attach to such goods to the exclusion of the claim of the seller, who elects to rescind the contract of sale, no new consideration having passed from the mortgagee to the mortgagor, at the time of such addition to the mortgaged stock.
8. When the question was whether goods belonged to defendant in *fi. fa.*, what he said when he bought them, is admissible to show fraud practiced by him, though plaintiff in *fi. fa.* was not present. (R.)
9. The verdict in this case is not contrary to law, evidence, or the weight of evidence.

Claim. Fraudulent Purchase. Evidence. Mortgage. Before Judge HOPKINS. Fulton Superior Court. April Term, 1871.

On the 18th of September, 1868, E. H. Muse gave his promissory note to Willis P. Chisolm and Fortune N. Chisolm, for $12,146 50, due one day thereafter. And, to secure it, he mortgaged to them his "entire stock of dry goods, consisting of silks, satins, calicoes, ribbons, bombazines, poplins, muslins, hats, shoes, boots, bonnets and all other articles of merchandise, belonging to and embraced in

the stock of dry goods contained in the store-room" occupied by himself, on Whitehall Street, Atlanta, Georgia. This mortgage was recorded on the 26th of October, 1868, and foreclosed on the 7th of November, 1868, and, on the 9th of November, 1868, was levied upon the stock of goods *then* in the store. Chittenden & Company claimed certain of the goods levied upon, and replevied them, and others did the same as to other of said goods.

On the trial of Chittenden & Company's claim, counsel for the Chisolms introduced their note and mortgage, the proceedings of foreclosure, the *fi. fa.* and levy, proved by the levying officer that he levied upon the entire stock in said store, that they were in Muse's possession, and worth $18,000 or $19,000; that different claimants subsequently took out $7,675 18 worth of the goods, some of which were returned. Here they rested their cause. Chittenden & Company showed that, early in October, 1868, Muse purchased from them, in New York, the goods claimed by them, two-thirds on credit, for $899 18; that he obtained this credit by having represented to Chittenden & Company, that he then had, in Atlanta, a stock worth $7,000; that he had $2,000 in cash, and some other property, and owed but $700 or $800, which was balanced by debts due to him; and by representing, in person, besides, that his stock was worth $10,000, and his life was insured for $5,000, and that he had $25,000 in railroad stocks. And they testified that, but for relying upon said representations as true, they would not have sold Muse the said goods. The Chisolms objected to the statements of Muse as evidence against them. They put in evidence the receipts of the other claimants, given to the levying officer for goods claimed by *them*. They amounted to $3,683 84 in value. They proved how their goods were selected from the stock, and without damage to it. It was shown that subsequently other persons, who had sold goods to Muse, at the same time, claimed and replevied them, and that the Chisolms settled with some of them, and had the goods taken

by them returned to the stock. The Court refused to allow the witness to state how much the Chisolms paid in said settlements.

Muse, in rebuttal, denied making the statements aforesaid, but admitted that he did not tell them of the mortgage; he said his stock, when mortgaged, was worth $7,000; when levied on was worth $18,000; and, after the various claimants had pulled and hauled them about, only $5,000. Another witness testified to the damage done to the goods by careless handling, and gave evidence to show that Chittenden & Company could not indentify their goods. Indeed, Muse testified that they took some goods which he did not buy that season. W. P. Chisolm testified that he and F. N. Chisolm had, at various times, loaned Muse money at one and a half per cent. per month to help him along, and held his note therefor; but, because one of his commercial notes was protested, they took said note and mortgage for his aggregate indebtedness; that they did not know that he was going to New York. He testified that, from the sale of the goods by the sheriff, they received $6,103 40 on their *fi. fa.* He proposed to testify to the amount paid out by them, in settlement with the other claimants, and the damage done to the goods not taken away, from careless handling; but the Court ruled this evidence out. A witness was introduced, and testified that Muse told him he had turned over to the Chisolms certain railroad stock, which Muse had denied having said. In rejoinder various persons testified that for years they had known Muse, and that his character had been above reproach.

The Court charged the jury, among other things immaterial here, as follows: If Muse bought the goods claimed from Chittenden & Company, in New York, and at the time of the purchase made statements to them, or one of them, in reference to his ability to pay for the goods which were false, and consequently deceived them, and if Chittenden & Com-

pany acted upon the faith of those statements, and gave credit to Muse, that would vitiate the sale.

If at the time the purchase was made, Muse was called upon by Chittenden & Company to give a statement of his financial condition, and he entered upon the statement and stated his condition in part, but witheld a material fact as to his pecuniary standing, in consequence of which Chittenden & Company were mislead, and he kuew it, that would vitiate the sale.

If the goods were purchased in the manner stated and upon the false statements and under the circumstances mentioned, and were shipped to Atlanta and placed in Muse's store, and at the time no money was advanced by the Cisholms on the faith of these goods, the goods are not liable to the mortgage *fi. fa.* The jury found for claimants.

The Chisolms moved for a new trial upon the grounds that the Court erred, 1st, in admitting Muse's statements in New York as evidence, (because the Chisolms were not present); 2d, in refusing to allow proof of the value of the goods by showing the amount for which the goods sold. 3d, in charging as above. 4th, in refusing to allow evidence of the amount paid out by the Chisolms in settling said other claims and of the *quantum* of damage done to the stock from careless handling, and because the verdict was contrary to evidence, etc. The Court refused a new trial, and error is assigned on said grounds.

L. J. GARTRELL; HENRY JACKSON & BROTHER, for plaintiff in error.

HILLYER & BROTHER for defendants. Fraud vitiates sale: 1 Paige's R., 491; 13 Wend. R., 570; 23d, 372; 1 Hill's R., 302; 21 Barb. R., 586; Kerr on F. and M., 331. The mortgage did not cover goods in excess of prime value: R. Code, sec. 1944. The *fi. fa.* was chargeable with value of goods levied on and not claimed by Chittenden & Com-

pany: 19 Ga. R., 537; 20th, 210; 6th, 392. If *fi. fa.* paid verdict right: 22 Ga. R., 348; 6th, 515; 7th, 380; 19th, 537; 20th, 210: 6th, 517.

MONTGOMERY, Judge.

The defendant in *fi. fa.*, Muse, mortgaged a stock of goods in Atlanta, worth $7,000 to plaintiffs in *fi. fa.*, in September, 1868. Shortley after, he went to New York, and by false representations as to his financial standing, (as the jury must have found to justify their verdict under the charge of the Court, though Muse swore he made no such statements,) induced the claimants to sell him some $900 worth of goods, for which he paid one-third cash. By this purchase from the claimants, and other purchases, the goods in the store which contained the mortgaged goods, were increased in value to about $18,000 The plaintiffs then foreclosed their mortgage on the stock of goods, and the sheriff levied on the whole stock found in the store.

Claimants put in a claim, identified the goods sold by them and replevied. Other claimants did the same as to other portions of the goods after claimants in this case had replevied theirs. The weight of the evidence is, that no damage was done to the goods by the claimants in this case overhauling them, in selecting the goods sold by them to defendant out of the lot; but much damage was done by the other claimants in their efforts to select their goods. When the claimants in the present case elected to rescind the contract of sale, they with others, represented by the same counsel, tendered through their counsel, to the defendant in *fi. fa.*, the amount of cash paid by him at the time of the purchase, which he refused. Plaintiffs in *fi. fa.* and defendant compromised with most or all of the other claimants, paying certain amounts to them and permitting them to take some of the goods.

No new consideration passed from plaintiffs in *fi. fa.* to defendant, at the time of the addition to his stock of goods.

Plaintiffs claim that the whole stock of goods levied on is subject to their mortgage. Plaintiffs also objected to the claimants giving in evidence the representations of defendant made to the latter in New York, for the purpose of obtaining credit.

1. We do not think the 1944th section of the Code warrants the interpretation sought to be given to it by plaintiffs in *fi. fa.* If so, it would open the door to unlimited fraud. A very small amount of goods might be mortgaged, and then an unlimited addition made to the stock, all of which would be covered by the mortgage, to the exclusion of the very creditors from whom the goods were bought.

2. The general rule is, that when personal property is levied on it is, *prima facie*, a satisfaction *pro tanto* of the execution. That plaintiff and defendant in *fi. fa.* compromised with certain creditors by permitting them to take some of the goods levied on cannot be permitted injuriously to affect the rights of contesting creditors, not parties to the compromise: 20 *Georgia Reports*, 210; 19 *Georgia Reports*, 589; 30 *Georgia Reports*, 433; Code, sections 3607–8–9.

Plaintiffs in *fi fa.* insist that they are at least entitled to have the property subjected to their claim to the extent of the cash paid by the defendant to the claimant at the time of the purchase. Had a bill been filed, or if, under our law, the claimants had been put upon notice by proper averments in the pleadings at law, this might possibly have been done. As the case stands, to set up such a claim now, especially where the amount in cash had been tendered back, on election by claimants to rescind, would operate as a surprise upon them. They might show, if duly notified, that such a claim would be made, that a proper disposition had been subsequently made of the fund received by them at the sale.

5. The alleged false representations of defendant as to his pecuniary standing were properly admitted. His title depended on the fact whether or not he made the false statements.

6. If he did make them, he got no title: Code, sections 3117, 2591, 2592.

7. If he got no title, he could convey none, where no consideration passed from the purchaser. It is said the consideration moved from the mortgagee at the time of the making of the mortgage; true, so as to cover all goods to which he might subsequently acquire title, added to his stock within the amount of the original value of the stock mortgaged, but certainly not to cover goods belonging to third parties, which might by some means become mixed with the mortgaged goods.

8. The sayings of the defendant at the time of the purchase were part of the *res gestæ* by which he acquired title, if he had any, and do not come within the principle laid down in *Dollner, Potter & Company vs. Williams*, 29 Georgia Reports, 743.

Judgment affirmed upon the grounds stated in the head-notes.

WILLIAM R. PHILLIPS, plaintiff in error, *vs.* THOMAS C. HYDE, defendant in error.

(BY TWO JUDGES.)—1. Where an attempt is made to foreclose a lien upon a steam saw-mill, under the Act of October, 6, 1868, it must affirmatively appear in the affidavit that the prosecution of the lien is within one year from the time the debt becomes due; it is not sufficient, where the debt is liquidated by promissory notes, to show that the notes have fallen due within the year.

2. Where such defect appears on the face of the proceedings, and the *fi. fa.* has issued, and been levied on the mill, and a claim interposed, the claimant, on the trial of the claim case, may take advantage of such defect, by objection to the affidavit, judgment and *fi. fa.*, when offered in evidence.

3. Where the affidavit fails to state the time the debt fell due, and plaintiff in *fi. fa.* is offered as a witness to prove that the consideration of the notes sued on was work and labor done on the mill, it is competen

for claimant to ask him at what time he performed the work, as preliminary to proving that the debt had been due for more than a year. 12th March, 1872.

Lien. Pleading. Claim. Practice. Before Judge HOPKINS. DeKalb Superior Court. March Term, 1871.

On the 11th of May, 1870, Hyde made an affidavit before the Deputy Ordinary of said county, "that Robert J. Wall is the owner of a steam saw-mill, situated in the county aforesaid; that the said Robert J. Wall is due deponent $87.70, besides interest on two promissory notes for work and labor by deponent, done and performed in and about said steam saw-mill, as an employee; that deponent has demanded payment of said Robert J. Wall, and that the said Robert J. Wall has failed and refused to pay the said amount with interest; that said notes became due and payable within the last twelve months. Deponent claims a lien upon said steam saw-mill for the amount and interest aforesaid." A copy of the two notes was attached to the affidavit. They were dated the 25th of March and 20th of April, respectively. Thereupon, on said 11th of May, 1870, a judgment was entered for said sum and interest against Wall, to be made out of said property; and a *fi. fa.* was issued thereupon, accordingly, which, on the 14th of said month, was levied upon said property. Phillips claimed said property.

When the claim was tried, Hyde read in evidence said affidavit, judgment, *fi. fa.* and levy, over the objection of Phillips' counsel. The ground of objection does not appear by the record. Hyde then testified, in his own behalf, that Wall was in possession of said property, when he performed said services, when the *fi. fa.* was issued, and when it was levied. Phillips' counsel asked him when the services were performed, the character of them, and when the services ended, but the Court would not allow these questions answered. The cause being closed, the Court charged the

jury, among other things immaterial, that, if Wall was in possession of the property when the service and work was performed, and when the *fi. fa.* issued and was levied, in the absence of other proof, they should find the property subject to the *fi. fa.* The jury found the property subject thereto.

Phillips' counsel moved for a new trial, upon the grounds that the Court erred in allowing said papers to be read as evidence, in refusing to allow Hyde to answer said questions, and in chargingas aforesaid ; and because the verdict was contrary to law and the evidence. A new trial was refused, and error was assigned upon each of said grounds.

HILL & CANDLER, for plaintiff in error.

L. J. WINN, for defendant.

MONTGOMERY, Judge.

The facts as stated by the Reporter, and the judgment as pronounced from the Bench, make it unnecessary to do more here than repeat what was there said. (See head-notes.)

Judgment reversed.

SAMUEL STRAUS, plaintiff in error, *vs.* B. HERMAN, defendant in error.

(BY TWO JUDGES.) When A sold goods to B and received in payment certain tea-pots, spoons, forks, etc., at so much per ounce, B representing them to be sterling silver, imported by him, he knowing them to be merely plated and of small value, and A took the articles on the faith of B's representations:

Held, That A may tender back the goods, treat the payment or sale of the articles to him as fraudulent and void, and sue for the price of the goods. 12th March, 1872.

Barter and Sale. Rescinding contracts. Before Judge HOPKINS. Fulton Superior Court. April Term, 1872.

Straus averred that Herman was indebted to him $127 66, because he sold Herman a diamond pin for $155, of which Herman had paid him but $27 34. The testimony was that at the time and place stated, Straus let Herman, a jeweler, have a diamond pin at $155 and took, in exchange therefor, certain ware, at the estimated value of $127 66 and $27 34 in cash; that Herman represented that said ware was pure silver, imported by himself; and relying upon this representation only, Straus took it at said price for family use. It was not silver, but some base metal, not worth over $20. When Straus found out that the ware was not silver, he had it tendered back to Herman, saying Straus wished to rescind the trade. Herman replied that he had sold the pin, and refused to receive the ware or pay the amount allowed for it in said trade. The ware was then deposited, subject to Herman's order, of which he had notice. It was tendered to him upon the trial also. Upon this evidence the Court non-suited plaintiff. That is assigned as error.

NEWMAN & HARRISON, for plaintiff in error. The trade was void for fraud, and Straus could recover value of pin: R. Code, sections 2591, 2592. Contracts void in part or wholly: R. Code, sections 2599, 2683. Barter and exchange on same footing: R. Code, section 2614. *Assumpsit* was proper action.

E. F. HOGE, for defendant. Barter and sale on footing of private sale: R. Code, section 2614. Contract executed cannot be rescinded: R. Code, section 2610. Rescission must put parties *in statu quo*, when contract was made: R. Code, section 2610; 41 G. R., 179.

McCAY, Judge.

Under section 2614 of the Code, contracts of barter and exchange stand on the same footing with private sales, so far

as the same principles can be applied to them. Suppose th had been a sale in all respects. Clearly, under the eviden the purchaser of the silver had a right to tender back the sa and sue for the value he paid for it. In this case he tender back the silver and offered to rescind. In the trade the s ver was taken at a fixed price per ounce. Its precise valu as estimated by the parties, is therefore ascertained. The d fendant refuses to redeliver the pin in any event; says in fi that he has sold it and cannot deliver it. Clearly, therefo the real wrong done to the plaintiff is to be measured by t value put upon the ware by the parties in the trade. He o fers to restore that ware and asks its money value.

It is admitted that, under the proof, he might, had he o fered the $27 as well as the ware, recover the whole val of the pin. But the defendant has disposed of the pin. I is unable to give it up. It was therefore useless to gi him that option; since, by his own act, he had made it in possible for him to return the pin. It seems to us, th it would be sticking very closely in the bark to say that ought to have offered to rescind entirely, that is, offered ba the *money* also, and then sued for the value of the pin, allo ing a credit for the money. That is in effect what has be done.

Did it appear that the defendant was willing or able to r scind at the time of the demand, there might be ground f saying that the plaintiff had not done enough, but the pr shows that he denied having the pin; so that he could r restore it, and there was therefore no use in offering him t $27 as well as the wares. Applying the rule in the case sales to this case, so far as the circumstances permit the s plication to be made, we think the present action is sustain by the proof. Here was a clear fraud on the defendant, put it out of his power to rescind the trade. The plain offered him the next best thing, viz: "Here is your pla ware, pay me what I took it at." He refused also this.

We think, under the facts, he had a right to sue for t

agreed price of the ware, and the Court ought to have allowed the jury to pass upon the proof.

Judgment reversed.

HARRISON WESTMORELAND, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. An opinion formed and expressed from hearsay as to the guilt of the accused does not disqualify a juror from trying the case.
2. It is no ground for challenge to the array that some of the jurors were summoned by a bailiff, in attendance upon the Court and under its direction, unless the defendant shows that he is in some way prejudiced thereby.
3. That a witness did not hear all of a conversation of defendant about which he is called to testify, is no ground of objection to his stating so much of it as he did hear.
4. The defendant cannot give in evidence his own sayings as to when a certain injury was inflicted upon him, and who inflicted it, made to his physician two or three days after the perpetration of the act for which he is indicted.
5. It is not error in the Court to refuse to charge the jury that if they have a reasonable doubt as to the sanity of the prisoner, they should acquit, where he charges them, "If, after a careful survey of all the testimony, you have a reasonable doubt of the defendant's guilt, you will acquit him."
6. A juror's affidavit will not be received to impeach his own verdict.
7. Mere information to a jury that a bet has been made by a named person as to the result of their verdict, without more, is no ground for setting the verdict aside.
8. Misconduct on the part of the jury, while they have the case under consideration, from which injury might have resulted to the defendant, throws the burden upon the State to show affirmatively that no such injury has resulted. In this case, the State has done so.
9. The verdict, in this case, is not contrary to law nor the evidence; neither is the charge of the Court inapplicable to the facts.

Criminal Law. Jurors. Evidence. Insanity. Tried before Judge HOPKINS. Fulton Superior Court. April Term, 1871.

Westmoreland was charged with an assault with intent to murder C. L. Redwine, by shooting him with a gun. He pleaded not guilty. While the jury was being impanneled a person was presented, and, upon examination, answered as follows: Question. "Have you, from having seen the crime committed, or having heard any of the testimony delivered upon oath, formed and expressed any opinion as to the guilt or innocence of the person at the bar?" Answer. "No; but I have formed and expressed an opinion from rumor." Question. "Have you any prejudice or bias resting on your mind either for or against the prisoner at the bar?" Answer. "No." Question. "Is your mind perfectly impartial between the State and the accused?" Answer. "It is." Question. "Are you conscientiously opposed to capital punishment?" Answer. "No." The State put him upon the prisoner. The prisoner's counsel objected to him because he had formed and expressed an opinion as to his guilt or innocence from rumor. The Court "put such questions to him as to enable the Court to understand the state of his mind." He was asked if he could discard the rumor and do equal and impartial justice between the State and the accused, and he answered that he could. And the Court "being well satisfied of the truth of his answers to those questions," (including the statutory questions) pronounced him competent. He was challenged by the prisoner; but the jury was made up without prisoner having exhausted his challenges allowed by law.

The first pannel of jurors being exhausted before a jury was made up, a new pannel was summoned and put upon the prisoner. His counsel challenged the array, and moved to set that pannel aside because it had been summoned by a bailiff, and not by the sheriff or his deputy. The motion was overruled.

The frequency of such defenses, and the importance of the principles justify an extended report of the evidence.

To understand the evidence, it is proper to remark that Whitehall street, running north and south, is crossed at right

angles by Alabama street. Redwine & Fox's drug store is on the southeast corner of said streets, and diagonally across is Lynch's corner, occupied then as a book store. Each of these streets is about sixty feet wide. To reach the Constitution office from said drug store, the route is up Alabama street, and that office was on Broad street, north of Alabama street. Redwine's boarding house was on Pryor street, and to reach it from the store, the direct route was up Alabama street, on its south side.

Howell testified that he and Redwine, after dark, about 7 o'clock P. M., in December, started to a collation at the Constitution office. They went diagonally across from the drug store towards Lynch's corner; in going they were talking, and Redwine had his hands in his pockets, with his thumbs out, and Howell had his arm. As Redwine stepped upon the sidewalk of Alabama street, some ten or twelve feet west of Lynch's corner, some one hallooed "look out!" Howell turned, and Redwine turned his head, and immediately a gun fired. Redwine put his hand to his side with an exclamation, and bending over, walked back to his store rather briskly. Howell walked to Lynch's corner, where the gun was fired, and saw Westmoreland standing with a double-barreled shot-gun cocked. When he fired it it was all exposed but the butt of the gun which was under his talma. Howell rushed into the side-door of the store at Lynch's corner, and said that Westmoreland had shot Redwine, and when he came out again several persons were talking with Westmoreland, and he said something about his gun havin g twelve buckshot in it, but witness did not hear all he said then. Westmoreland had on a talma, and though a gas-lamp was burning on the opposite corner, and inside the store at Lynch's corner, Howell did not recognize Westmoreland till he shot. He remembered seeing a man at Lynch's corner, and thinks it was light enough for him to have seen his gun had it been exposed, but he did not see the gun till he fired. When Westmoreland fired he was about twenty-five or thirty feet from

Redwine. Howell went to the store to look after Redwine, and finding him in the hands of physicians, he returned to Lynch's corner. Finding that Westmoreland had been carried to the calaboose Howell went there. Wise and two or three policemen were there, and Westmoreland was in a cell, alone. Westmoreland was talking about the occurrence when Howell arrived. Howell remembers only two of the remarks made by him. Westmoreland said "he had walked over this matter as long as he could." The cell door was then opened and Howell asked Wise to ask Westmoreland if he knew who was with Redwine when the gun was fired. Westmoreland replied that he did not know who the person was, but that he gave him notice to get out of the way. Howell said he did not remember all that was said, but he heard all that Westmoreland said while he, Howell, was there. When the door opened Westmoreland was crying. Howell said he had known Westmoreland fifteen years; that he frequently saw him at said drug store when he thought by his conversation that he was drinking; he never saw him stagger, nor guilty of any disorderly conduct at such times; he was usually very quiet. (Because Howell did not hear all Westmoreland said defendant's counsel moved to rule out what he did hear. The motion was overruled.)

Dr. Redwine testified as follows: A week or two before the shooting he treated Westmoreland with some indifference because he was in the store drunk. On the day before the shooting, Westmoreland was in the back part of the store, standing by the stove, with a knife in one hand and a cane in the other, cursing and making a noise, so that Redwine heard him in the front of the store. He supposed he was cursing Dr. Branham, who was standing with him. Redwine walked to Westmoreland and said, "we have put up with this profanity as long as we canst and it;" said to Westmoreland that he had become a nuisance to the store, and that he must go out and stay out till he could keep sober and behave himself. Redwine took him by the arm and led him

unresisting toward the front door. Westmoreland stopped and said, "Is this your style?" and Redwine replied that he wished him to go out of the store, and stay out. As Westmoreland got out of the front door, and Redwine was standing in it, Westmoreland struck him with the cane, "about as large as one's thumb." It struck Redwine's uplifted arm and broke; Redwine got one piece of it, about eighteen inches long, of the large and crooked end, and Westmoreland retained the other; Westmoreland threw his part of the stick at Redwine, which he dodged, and struck Westmoreland over the head with the piece which he had. Westmoreland's felt hat was not knocked off by the blow. Redwine said to him then that he was an old man, and that he did not wish to hurt him, and wished no difficulty with him. Westmoreland walked off a few steps, and turning, said, "God damn you! hell awaits you;" and walking a few steps further stopped and repeated those words or some like them. Redwine denied kicking him, or at him. That was about three or or four o'clock P. M., and Redwine saw no more of him till he was shot by him the next night, about his usual supper hour, seven o'clock P. M.

He then stated the leaving of his store, etc., substantially as Howell did. He said his wound from the shot was on his right arm and in his right side, between the seventh and eighth ribs, below and behind the right nipple. One shot passed through his arm and below the elbow, and one cut the skin above the elbow. He said he was over a month unable to turn, and two months confined to his room, from said wound in his side. He said Westmoreland was habitually at their store, and knew his route to supper, and his usual time of going. He said Westmoreland was habitually drunk and profane; that he had never ordered Westmoreland from his store before, but Fox had; that he (witness) had before asked him to desist from cursing, and sometimes he did. Westmoreland never staggered from liquor; sometimes his gait was unsteady. Redwine never saw him

too drunk to keep him from recognizing persons, and know what he was doing; he practiced medicine, and had his prescriptions carefully prepared; and knew well what prescriptions were proper. He said that the prescriptions were no usually put up by himself (Redwine), but by his partne and clerks. He considered Westmoreland as a friend to th store; he had had his headquarters there, and paid for al the medicines he bought. Sometimes Westmoreland bought opium and morphine. He testified as to the effects of liquor and opium on the mind, which see hereafter, under insanity. For convenience of reference, all the evidence as to insanity is grouped together.

Dr. Crawford, Redwine's physician, described the wound and said that the shot taken from it were buck-shot.

A witness testified that, as he went to supper that night, he met Westmoreland, about two squares south of Redwine & Fox's store, going up Whitehall Street, towards said store, and away from his home. He had a gun in his hand; they did not speak to each other at the time. Afterwards, say in half an hour, he heard of the shooting.

Mr. Woodding testified that, on the night of the shooting, he heard many things said by Westmoreland, in the guardhouse. The only one remembered distinctly was Westmoreland said he had shot the G—d d—d s—n of a b—h, and that if he did not kill him it was not his (Westmoreland's) fault; said he was not sorry for the shooting, but sorry that he had to do it. This was about an hour or an hour and a half after the shooting; and Westmoreland talked on, in that way, for about an hour. Witness was then in charge of the prison, and was till about 10 o'clock P. M. Westmoreland seemed to be drinking, and talked all the while, repeating his conversation whenever any one came in. Sometimes Westmoreland cried; he slept some time. Some one gave him some liquor. Witness frequently saw Westmoreland when intoxicated, as he supposed; but he never staggered, would walk, stop awhile, and then walk again, as if deliberating;

ut never saw him walk except in a slow, measured pace; ever saw him misbehave.

The bailiff who took him to the guard-house said, that hen he arrested Westmoreland, he gave up his gun, and went illingly, talked all the way, telling how his gun was loaded, nd saying he would have used the other barrel if it had een necessary.

Mr. Blanchard swore that he saw Westmoreland as he came ut of the door of the drug store, and gave the same account of hat was then and there done, as Dr. Redwine gave, except he aid Westmoreland seemed to him to have been pushed out f the door, and that the blows struck were insufficient to ave staggered a ten year old child. Here the evidence for he State closed.

EVIDENCE FOR THE DEFENSE.

It was shown that Westmoreland habitually used intoxica- ing liquors and opium. It was contended that his head was injured by Redwine when he struck him and the defense as directed to showing the effect of these things on his mind.

On cross-examination, Dr. Redwine had testified as follows: "The effect of long continued use of morphine and liquor n the mind would depend upon the quantity of each aken. It might impair the mind to some extent; in other ases it would not have that effect, but only stupify the ind. I have known some to take it for several years with- ut that effect. If a person accustomed to their use received severe blow on the head, it is probable that inflammation ould be excited readily. I do not believe that a slight blow n the head of such a person would have a greater effect than n one not so accustomed to use opium, unless there was a ontusion or abrasion of the skin, then it might produce in- lammation sooner. If inflammation of the brain ensued hat would affect the mind; that is the internal result of in- ammation on the brain. Morphine has a tendency to quiet e brain and to produce stupor. Intoxicating drinks gen-

erally excite the brain; opium and morphine have a soothing effect, and if taken in excess they stupify the system. The effect of long continued use of opium and morphine on the mind depends on the quantity taken and the constitution of the person using it. No regular rule can be laid down. If taken constantly and excessively it produces a kind of stupor. If kept up for years it would affect the mind and brain in many cases. The use of liquor added to morphine and opium might have the same or similar effects; that depends upon the quantity, constitution and length of time. It affects all persons more or less; does not always impair the mind particularly.

Redirect: I cannot say that the joint action of alcohol and morphine would balance each other. If he took both simultaneously it would likely increase the excitement. I never saw the least evidence that Westmoreland's mind was not as clear as mine, or any other man's; his prescriptions were clear and his conduct as a physician was as good as anybody's; his mind was not affected except when directly under the influence of opium or liquor. When the effect passes away the mind is clear.

Re-cross: There is no difference in the effect on a sober man or a drunken man, if the skull was fractured; unless there is some contusion or fracture of the skull. A blow upon the head might affect the brain without breaking the skull, if it produced concussion of the brain; but it would not probably produce concussion without fracture—it is possible. When one is intoxicated he is excited, but there is no other change in his mind. That the seat of reason is in the brain, is the accepted theory of medical science; there is no organic change in the brain when under the influence of liquor; a drunk man does not exercise his reason as when he is sober, but a drunk man is not insane.

Dr. Roach testified as follows: Dr. Calhoun was attending upon Westmoreland in the jail; about two weeks after the shooting, witness examined Westmoreland's head, and

found an injury on its left side, near the top; at some time he had received an injury on the cranium, caused probably by a direct blow by some hard substance; in witness' opinion that blow produced a fracture of the external table of the skull—the depression is there yet; the brain is still below the inner table of the skull; the inner table will not resist force as well as the outer one—it is more flexible and porous. Westmoreland was complaining of his head when witness examined him. If a drunkard receive a blow upon his head, when reaction came on the inflammatory stage would be greater and longer than in a sober man; he would be more liable to inflammation of the brain. Westmoreland is about fifty-four years old; I have known him fifteen or sixteen years as a physician; he has been intemperate since the war; have seen him frequently under the influence of liquor; before the war he was not only intelligent, but of good morals and respectable; since then he has drunk to great excess, and used morphine and opium habitually, and has been very poor.

Cross-examined: That wound on Westmoreland's head was made at least twelve months before witness examined it; it may have been there longer; it bore no evidence of having been made at any time recently before my examination; it was old—of long standing—had gotten well. The effect of a blow on the head is not changed by the stricken one being drunk or sober; the effect on his mind would be the same in either case; if one is struck and walks off, that is evidence that there is no concussion; he may, however, have concussion afterwards, as the result of internal hemorrhage; unless the blow is heavy enough to produce concussion it cannot produce internal hemorrhage. I never took Westmoreland to be an insane man; he was always able to transact business, and had no symptoms of insanity. I know not as to the tendency of opium eating to produce insanity; I have known persons to use it seventeen years who are sane; I wont say it might not make one insane; it is possible that liquor might produce insanity, but I never knew an instance of the kind. I

do not know that opium and liquor combined have a t dency to produce insanity.

H. Muhlenbrink, a grocery keeper, testified that he not believe Westmoreland was of sound mind; that he dr at his grocery every day; would, when under the influen liquor, sing vulgar and indecent song, quote Latin and Gr call for tigers, wolves, hyenas and the like, and did not s to him to be rational. He said he never saw him take n phine, but he thought that he was worse about six weeks fore he shot Redwine.

Kramer, a druggist, said he knew Westmoreland to morphine every day for several months, in the summe 1869, and that he habitually used liquor also; that whil could not say he was insane, he believed his mind was paired thereby. He lived in same house with Westmorel in summer of 1869, and he would come in quarrelling v imaginary persons, who had insulted him and call for gun. His wife kept the gun hid. Once about dusk, in s a case, his wife hid his hat. He took her sun-down shawl and his gun, and went out and staid till about ele o'clock, and when witness asked where he had been, an said he had been trying to kill a dog.

Dr. Calhoun testified as follows: Have been practicin the jail six years. When Westmoreland was put in, sho after the shooting, he had his attention called to a depres in his skull, about as long as his little finger and abou deep as a third of said finger. Would have examined it ther, but Westmoreland flinched and said it was extren painful and so I made partial examination. It seemed t very sore. I had no reason to believe it was recent, ex the flinching, etc., aforesaid. It must have been inflicte a hard round substance, like a stick.

He was asked what Westmoreland said about the wo when he was examining it, and as to who inflicted it, when; but, upon objection made, the Court would not a the question answered.

He said: I know Westmoreland was almost always under influence of liquor or some narcotic. Long continued excessive use of them has a dementing effect like old age, occasioning loss of memory, thought, reason and judgment. If one were really insane, he would show it when sober, but more when under influence of liquor. There is a very material difference between *dementia* from alcoholic drinks and from old age. Have seen Westmoreland under influence of liquor; he was more or less insane. Insanity includes various degrees. I mean by insanity anything that renders the mind unsound temporarily. When a man has a high fever he is not insane, (some men are); if it is high enough to produce delirium he is not sane. If one drink of liquor is sufficient to produce drunkenness he is not sane. When one is under a violent passion, for the time being, he is not so rational as when cool. The term insane includes every feature of unsound mind. There is a slight degree of insanity called a crack in the head; the Scotch call it a "bee in the hat." When free from alcoholic drinks, Westmoreland could distinguish between right and wrong. He was in a demented condition when he came to the jail. I thought he might have *delirium tremens*, and treated him to avoid that. When free from liquor and narcotics, he was rational and as ordinary men. To avoid *delirium tremens*, I restored him to what I considered a sound condition of mind.

S. Downs, a liquor seller, testified that Westmoreland habitually used liquor and morphine; that when drinking, he used profane language and indecent expressions, and he, Downs, believed that his mind had been impaired by their use. He said he knew, by experience, what he talked of, for he had been so drunk that as not to know what he talked about or did, and said "that is what I mean by insanity."

James Loyd testified as follows: He was in the book store when Westmoreland shot; when he and others ran out Westmoreland was standing, gun in hand, and said, "boys! didn't he crack?" meaning his gun. He "went on a good deal,"

speaking of shooting Dr. Redwine; said, "if that did no kill him, I have twelve more buckshot that would kill him." I thought no sane man would so speak and act. I was o the party which took him to the calaboose. There he would sometimes talk, laugh some, cry and curse, and "go on" before he had liquor there, say three-quarters of an hour after the shooting. I had not seen Westmoreland drunk that day. He acted as if "not right, drunk or something." I thought he was drunk; he acted like a drunken man, and I suppose he was drunk. He said once in three or four years, he saw Westmoreland take some opium from his pocket and bite off a piece.

Judge Hayden testified that he had seen Westmoreland take from his vest pocket something in a paper and bite, say a half dozen times, and he supposed it to be opium. I thought he was killing himself by using opium. Do not believe his mind was impaired, and have no idea that he did not know that it was wrong to shoot a man—one must be pretty far gone for that; but I saw no indications of want of sound mind in him.

Jentzen, a liquor seller, said he had sold Westmoreland liquor almost daily for years, and that he drank to great excess; also that he carried morphine in his vest pocket and frequently drank it in liquor or water. He said Westmoreland would sometimes sit down and say nothing; then, all at once, would begin to sing a song; then he would curse and knock his cane on the floor. Usually witness advised him to be quiet, to go home. Sometimes he would sit down and be quiet awhile, and then jump up and behave as before, without any one speaking to him. He never saw any drunk man behave as Westmorelaud did.

A. Gaines Chisolm knew Westmoreland as a free-drinker, never saw him use opium. Was with Loyd when the shooting occurred, and heard Westmoreland, speaking of his gun say, "Did she not pop?" or "Did she not crack?" Saw him at calaboose in an hour or an hour and a half after that; h

talked, cried and cursed, talking at random about the difficulty and cursing; don't remember anything he said. We took the whisky to the calaboose for him.

Griffin, a crocery keeper, testified that Westmoreland drank at his bar morning, night and noon and at night of each day; he was always "tight," except very early in the morning, then nervous till he got a drink. On the morning of the shooting he did not complain more than usual; on the day before he complained of his head, about four o'clock P. M.; he said he had a difficulty with Redwine, and that Redwine had struck him with a stick. He talked sensibly a good deal of the time; he was talking at random before that, a kind of foolish nonsense. I thought he talked as sensibly as common; he made no threat. He sat by the stove, seemingly in a study, and said: "Griffin! I have been badly treated," I asked how, and he said: "I have been making Redwine & Fox's house my headquarters, I have spent a good deal of money there, and Redwine kicked me out of his house like I was a brute; it has hurt me and mortified me." I have seen no evidence of a want of a sound mind in him when sober. I think some three or four times, probably a year before this difficulty, I saw him so drunk that he could not distinguish right from wrong. He was rational in the morning before drinking. He used a great deal of opium and morphine.

John McGee, another liquor seller, testified to Westmoreland's frequent drinking, and to his carrying and using morphine, and said that, when under the influence of liquor, he did not behave like a sane man; would talk to himself, talk foolishly, in a peculiar and strange manner; he did not behave like other drunken men.

Thomas Hayney said Westmoreland drank to excess; would go along the streets, swearing to himself, no person near him. I have heard him sing songs; have seen very uncalled for actions on the part of an educated man; he would use bad language, and acted in a very curious way. When singing, he would have a stick, and "kinder go round," and sing

obscene songs, half a verse, and then curse, no one interrupting him. I never saw a drunken man act in his peculiar way. At his request, witness bought some quinine for him, since the difficulty.

Mason, a book binder, testified that Westmoreland was his physician in 1867, and before, and had changed very much since. He had been habitually drunk. He would mutter to himself, cursing everybody, apparently, to himself; singing, and doing everything ridiculous. His mind was not as sound as it had been; I thought his conduct was unusual and remarkable; may have seen drunken men act as he did, but did not know how they acted before. He sung the most vulgar songs, and used the most blasphemous language; have seen him sit and sing, take off his shoes, and kick at them.

Smith, a liquor seller, had seen him use opium, and knew him to drink habitually. When under the influence of liquor his mind seemed wrong; he would sing vulgar songs, and use indecent language.

A. M. Perkerson, deputy sheriff, testified that once or twice, within a year and a half, or two years last past, he had observed that when a negro passed Westmoreland on the streets, he would curse him to himself, as if he did not intend the negro to hear him.

P. Huge testified that Westmoreland was not what he used to be before the war; his mind not all right, all the time. He would sit alone, sing songs; go along by himself, singing songs and talking. Don't think he knew right from wrong all the time. If made mad, he was not too good to shoot any one. He got more restless; not so steady as he used to be; more ready to resent any insult than he used to be.

G. W. Anderson testified that he had known Westmoreland for many years, particularly since the war; seldom saw him free from the effects of liquor, and had seen him take morphine. Have known him to be talking on a subject, and he would break from it to another, or begin sing-

ing a song, a line or two, and swear; he was very wicked. Have heard him talk to himself and sing to himself, when no one was in the room, and when others were with him. He would go off to himself, begin talking and singing to himself, a few words; would quote poetry, or say some he had made up. I have not thought him in his right mind for several years, not all the time. At times he did not act as he used to, and I spoke of it to friends. He so behaved mostly when under the influence of liquor. Sometimes he was calm and quiet and spoke courteously.

R. J. Cowart knew Westmoreland sixteen years. He used to be a gentleman, dressed well, appeared well, and practiced medicine with success. After the war I regarded him as something of a wreck, physically and morally; he drank excessively. Up to this difficulty, I regarded him as a harmless man, always under the influence of liquor or morphine. I thought him more or less demented; never suspected he would have a difficulty. Have noticed him since the difficulty, and, if I am not mistaken, I think his mind not right; don't think he should go at large. I have thought his mind affected, since the war, but don't know to what extent. I mentioned it frequently to his friends.

R. S. Waters testified that he had known Westmoreland, many years; that he was generally drunk; had seen him conversing with gentlemen, and suddenly begin singing or cursing; he never acted so before the war; first saw him do so in 1864. Don't think he was of sound mind when drinking; have not known him to be sober in three or four years; never knew his condition, financially, before the war.

Dr. WILLIAM H. WHITE testified as follows: I am a physician all my life; I have practiced about twenty-two years. What effect has the long continuance and excessive use of ardent spirits on the brain or mind? The effect is different in different cases; in most cases the membrane covering the

brain would be thickened, a certain amount of lymph w
be thrown out, the cerus membrane would be softened, th
ing out a larger amount of fluid than usual, the general t
vessels would be distended, increased in size, and have a
gested appearance; that, in a few words, is the general ou
The brain itself would become softened or changed in ch
ter. It would increase a man's nervousness and irritabi
his brain would be more easily excited, and less under o
ary control of the nervous faculty. Insanity is a term w
by writers and others, has been differently expresse
should term it a deranged condition of the mind, so th
person is not capable of reasoning correctly upon any o
subjects; it may be one or more. It has been subdiv
into different characters — *mania*, *monomania*, *dem*
idiocy, or imbecility. *Mania* is a general deranged c
tion of the entire mental faculties. *Monomania* is a
rangement of one or more subjects, and correct on all o
Dementia is applied more particularly to old persons;
is, an entire loss of power—the power of thinking and
soning. What is the effect of long continued and exc
use of morphine and opium, together with liquor?
much the same as liquor alone; the symptoms are sim
the pathological condition of the brain is very much
Opium, in first effects, is laid down as a stimulating
cotic. There are cases of the human mind becoming
paired by alcohol and opiates. It has been my fortu
see as many as most men in ordinary practice, cases o
sanity or *mania* or *monomania*. What may operate o
mind may not on another. It is very difficult to dia
one disease of the brain from others of the brain.
effect would the long use of narcotic stimulants have
man fifty years of age, or more, on his reason? Your
tion is an important one. It would have different effec
different men; that depends on the constitution, the he
or unhealthy condition of the different organs of the
very healthy and robust, it would take more and l

to effect him to the same extent it would a man of les strength of constitution. There is no organ of the human body which could exist without the brain and spinal column, or nervous system; all depend entirely upon it. I propose to say no man can keep it up, for a number of years, without being afflicted with nervous disease; they will produce more or less disease. A mind thus afflicted is not as much under control as if it was not under this influence. In some men it would excite their fighting propensity; others it would make very mild. That depends upon the temperament of the man. Is one thus afflicted more liable to excitement and uncontrollable passion? If the person has a tendency that way, it would be more so; if accustomed to take spirits or opiates, his judgment would be more easily dethroned. No man who is in the habit of drinking or taking opium daily is in a natural condition. If a blow were struck on the head of a man in that condition, the concussion would be greater; a blow on the head would produce more serious consequences than on a man who was sober. Some of the signs of aberation are loss of memory, increased irritability, muttering, incoherent talking to one's self, talking first on one subject then on another, talking at random, loss of power, indisposition to do what a man in his natural condition would think. One of the marks by which insanity shows itself is melancholy. A sound mind is one that is perfect in all its actions—thinking and coming to correct conclusions on such subjects as are presented to it. These different symptoms vary with different persons—such as melancholy, walking about alone—and are not absolutely signs of a deranged mind. Some persons have a habit of talking to themselves, talking out loud. I have been engaged in the practice of my profession twenty-two years, till last August; occasionally since.

Cross-examined. I graduated at the University, Buffalo, New York. It was an allopathy school. The professors taught the different classes of science. It was generally con-

sidered an allopathy school. I can't say that I have practiced medicine here. I have prescribed for some. I came here last August. Almost every writer that has treated on insanity, speaks of talking to himself as an indication of insanity. I have looked over Taylor's Medical Jurisprudence in a hasty manner lately, within the last three days. It is usually the case that alcoholic drinks and narcotics will produce the effects I have spoken of, but insanity is not a necessary consequence; but there are cases where it has been the result. Insanity may result from a thousand different causes; there is no telling what may be the cause. Drunkenness affects different persons in different ways. If a man has become insane from alcohol or narcotics, can he then transact his ordinary business? If the insanity has been confirmed, or, in other words, a confirmed maniac or insane, I should answer, he could not transact his ordinary business; but, like all other men suffering from insanity, he may have lucid moments in which his mind acts rationally. I was going on to say, the continued use of stimulants and narcotics increased the circulation, the action of the heart and threw an increased amount of blood to the brain; in other words, the great number of capillary vessels of the brain being distended, compress the brain. If the stimulant was taken away, or not so great an amount taken, there would not be as great pressure on the brain, because the vessels would not be so full or so large; and by thus relieving the brain from pressure, a man might have a lucid interval. An idiot, no doubt, has lucid intervals. Idiocy is born with the person; it is an absence of the power of reason and thinking. The mind has lost its power for the time being, owing to some exciting cause, which, when removed, the mind resumes its natural condition. The brain is all there; some exciting cause prevents its action for the time being. It is a matter of question whether sleep suspends its action. I think it is then in a state of rest. A man thus afflicted has not a mind in a state of rest, in its natural condition. The other is a pathological change, either

in the membranes or the organ itself—the pulpy substance of the brain. As long as a man is capable of doing his ordinary business, is that a proof of his sanity? A person may be perfectly insane on some things, and yet, on other things, be sane. He may be generally insane. I would not pronounce the man insane who was in the habit of drinking liquor, and yet able to perform all the ordinary duties of life, as he had been in the habit of doing before he was drunk. There have been very few examinations of the brain in the condition mentioned, because they are apt to die from some other diseases, and when it is examined, we have to take that into account. If insanity ensued from the continued use of alcoholic drinks, would not that necessarily destroy the brain? Some it would injure, others it would injure very little.

Dr. D. C. O'Keefe testified: I am a regular licensed practicing physician. I have practiced twenty years. I know prisoner. I have known him since 1860. I have lived here and practiced medicine since 1860, except during the war. I have known prisoner since the war, I have seen him on the streets. I had no intimacy with him. I have met him on the streets almost every day, since the year 1866, 1867, 1868 and 1869, and to the present time. I do not know personally of his habits—only what I have heard. I think I have seen him when under the influence of narcotics or alcoholic drinks frequently. I did not talk with him much—a few times, not often. I remember of hearing of the shooting of Dr. Redwine. I saw prisoner frequently then and after. To what extent do the excessive and long continued use of morphine or opium affect the brain and mind? I think it is calculated to impair the mind, especially alcoholic stimulants. The brain is the seat of the mind. By the constant stimulating effect on the brain, keeping it in a constant state of excitement and stimulation, the brain would become diseased by its use. I think it would be likely to produce organic disease of the brain, in a man who was habitually drunk. I do not think the use of morphine and

opium impairs the mental faculties like alcohol does. Taking it for years would not be likely to affect the mind. Some of the first minds of the world, of literature and learning, have taken opium. De Quincy, for instance, the great English writer, has had as much as half a pint of laudanum in him without apparent injury to his mind. It is my opinion, that opium alone does not impair the mental faculties. The constant use of alcoholic drinks would impair the mind. I don't know that their combined use would have no effect. It would produce a condition of stupor on the brain and nervous system—the brain would be stupefied. The brain, when in a stupor, would not be in a sound condition. What is a mind? I mean a mind capable of exercising its faculties in their natural way. The mind, under the influence of opiates, would be blunted. The excessive use of opiates would blunt the mind. The use of stimulants will affect a diseased mind more than a sound mind. I think a man's mind may be impaired by the long use of alcoholic drinks. The signs of a diseased mind are various. Different kinds of insanity; *monomania*, is insanity on one subject; he may be perfectly rational on all others. It may be on religion, politics or anything else almost. Insanity is a broad term. It covers the whole. I am not an expert on the subject of insanity. I only know one man in Georgia who is an expert. He has given his study to it. That man is Dr. Green, of Milledgeville. He has made it his study. I consider him a better expert than any other man in Georgia. I judge that from his experience. When persons become deranged, they are usually sent to the asylum, and physicians do not treat them at home. The whole doctrine is laid down in books on medical jurisprudence. I think Taylor's Medical Jurisprudence is considered good authority. Idiocy is a different kind of insanity. That is a person who lacks mind originally. Long use of liquor may affect the mind. A mind diseased will yield sooner to strong impressions than a sound one. It would manifest itself by his doing unreasonable things, a

sorts of ways and things, talking unreasonably and doing unreasonable things, talking incoherently. A frequent way of manifestation is in the dislike that insane people have to their own family; that is a frequent development. He would dislike his wife, his father, his sister or brother, or cherished friends. Then they take up various illusions; one man will suppose he is Jesus Christ; then almost any variety of illusions; it is manifested in different ways, in different persons.

Prisoner's position as a physician was much better before the war than it has been since. I say this without knowing his affairs intimately. His condition before the war was better than it is since. Brooding over trouble is very likely to produce depression of the mind. Some people sacrifice their lives from that cause.

Cross-examined. Prisoner has looked to me as a man not of sound mind. He had a look of stupidity about him. If you were stupid all the time, your mind could not act. When the stupor is removed, the mind is right. From seeing prisoner pass along, he seemed to be in this stupid condition, and not able to follow his business. Opium might produce that effect. Opium won't impair the mental faculties. Drinking alcoholic beverages does not necessarily impair the mind. I have known men who drank all their lives, and were as bright as ever. If a man can conduct his business as a physician, put up prescriptions as usual, is that not proof positive that he knows right from wrong? I think it would be. If he were capable of practicing his profession intelligently, he would be a sound man. If he could diagnose disease and prescribe medicine correctly, is that not proof positive of a sound mind? Yes, sir. I mean to say, if a man has mind enough to diagnose disease and prescribe for it, his mind is in a good condition at the time he does that.

Dr. E. S. WITHERS testified: I am a regular practicing physician; I have practiced since 1848; I am now engaged in the practice of my profession; I am a professor in the

medical college, here. What effect would the long con
ued and excessive use of morphine and opium have on
human mind and system? They have the effect of de
itating and impairing the mind, both the mental and ph
cal faculties. The long continued and excessive use of s
holic drinks would have a similar effect, only in a gre
degree, affecting the brain, heart, stomach—in fact, e
organ in the system. I am not familiar with the subje
insanity, only theoretically. A party affected physicall
long use of opium and drink, impairing the physical s
does that not necessarily affect the mind? Always, to a
tain extent. Can a mind diseased or impaired resist i
ences, impressions, strong passions, and causes like tha
well as a mind perfectly sound? It does not. Has a l
on the head of a man thus influenced a greater effect
on the head of a man not thus intemperate? Yes,
Any injury would have greater effect on a person in
condition than on a sober man. A blow on the head
sober man would affect him less. A recent injury woul
more sensitive, and be sorer than an old wound. Befor
entire healing of the wound, and some time after, thou
may be healed, there would be a tenderness there. The
more sensibility in a recent wound. In some wounds the s
bility is not entirely destroyed for some time by the ac
on the nerves of the part, but usually the sensation is n
more acute in a recent wound than in one inflicted some
previous. Generally, the injury on the head of an in
ate would be more serious than on a sober person. If
effect on an organ, the brain participates with the othe
gans. The recuperative powers of the system are no
great, and the resisting power is diminished from the e
of alcohol, in a very great degree. As a general thin
fracture of the skull affects the brain. I should suppo
fracture of the skull on the top of the head, sufficient t
one-third of the little finger in, would affect the b
either temporarily, or it might be a life-time injury.

would generally be the effect. But the evidence of the fracture of the skull is not always the same criterion of danger or injury done. I suppose a blow of the above character would affect the mind of any one, to a greater or less degree. The brain occupies the whole of the skull. I am speaking now of a healthy condition. It fills the entire cavity of the skull. I suppose the brain is about a quarter of an inch from the external part of the skull. What intervenes? We have two tables and intervening cellular arrangements between; the outer is harder than the inner table, or the intermediate cellular substance. A blow on the outer surface might break down the intermediate substance; it would not necessarily break the inner table. I can imagine it to do so much damage, and no more. A blow that you could lay your little finger in, one-third of its depth, most probably would break down both tables, but not in all cases.

Some of the evidences of insanity are the want of power in an individual to regulate his actions and conduct, in the ordinary way, according to ordinary usage; it may be manifested in various ways: by his conversation, by his actions in regard to certain things in which, ordinarily, no man would be guilty of; then you see a want of control in regard to his actions, sometimes in many cases, then, again, only in one or a few subjects. It may be manifested by his fury or excitement; frequently, by an opposite condition, melancholy and quiet, morose condition; by excessive fear, frequently, of persons and things which, ordinarily, do not exist. There are a great variety of circumstances which show this. Expression of the countenance frequently is an index to a disordered condition of the mind. A man may be insane on one subject only; I call that *monomania.*

Crossed: The persons composing the faculty of the medical college are the two Drs. Westmoreland, Dr. Orme, Dr. Griffin; Dr. O'Keefe has been previously; he has been longer than I have; he is not a professor now. Suppose a wound of the character described to you, the indentation in the outer

table sufficient to lay one-third the little finger in, what would be the immediate effect? Most probably it would prostrate him, a blow of that magnitude. How long would the prostration last? That would depend on the amount of injury done to the brain; a wound of that kind may produce concussion of the brain or compression; it might destroy the power of locomotion; as a general thing, it would prevent a man going about and attending to his business; if he goes about, it is one evidence that it has been affected to a less degree, producing only very temporary confusion of the mind, to pass off in a few moments. A blow like that might affect him no more than temporarily; it would be so, if he goes about in his ordinary business. A blow of that magnitude would generally affect the mind more seriously; the power often varies, under different circumstances; he might be prostrated; that is the general effect of a wound of that severity; a blow causing a depression to cover one-third the little finger would generally affect the brain. I have met prisoner occasionally; I have only a speaking acquaintance with him.

Dr. JAS. F. ALEXANDER testified as follows: Have known prisoner twenty years. He practiced medicine before the war. He is about fifty years old; met him frequently during the last four years. He is very intemperate; drinks a great deal of whisky, and he uses morphine and opium to a great extent. Saw him almost every day, for several years, but don't think I have seen him free from the exciting or depressing effects of liquor and opium. The excessive use of them produces derangement of all the organs of the body; all are affected, more or less. I include the brain and all its surroundings. Liquor or opium, singly or combined, produces derangement of the organs, which will affect the brain. It affects the brain more than any other organ. How? The continued excitement by its stimulating effects, produces an increased action, which becomes a source of irritation; that, kept up, will finally produce a lesion of the brain, producing a degeneration of the organ itself, the structure of it. Lesion

means inflammation; or degeneration itself might be lesion. Liquor acts very powerfully on the brain; more powerfully than on any other organ of the system. The mind and brain would certainly be affected by the long continued and excessive use of liquor and opium. I am satisfied the mind would be affected by alcoholic drinks. A man's brain, when he is intoxicated, is congested; in a state of congestion. It is brought about by the excitement, that produces a flow of blood, and an excessive action of the brain itself. There is always a corresponding depression. A man gets drunk; when it passes off, a corresponding depression follows always. It makes him dull and stupid, and acts almost as bad as the stimulant itself. It is an abnormal condition of the brain. A man who gets drunk frequently, may have "*delirium tremens.*" There is danger of cooling off too suddenly, for depression follows. It is necessary to keep up a degree of stimulant. If he went too far down, there might be danger of death. It is one of the curative means we adopt for relief. A sound mind is one in perfectly healthy condition. When a man is drunk, he is not sane; that is my opinion. I think the excessive use of alcoholic drinks would effectually destroy the brain, if continued long enough. He cannot pass through four or five years' use of liquor, without having his mind very materially impaired. I mean when the use is continuous. I do not consider prisoner a man of sound mind, nor have not for some time. About the time of the shooting, I met with him every day; he was all the while under the influence of these stimulants. I do not consider him of sound mind now.

Cross-examined: I never heard of, or saw the wound on his head before now. I do not consider a man who is drunk sane. If a man can recollect what took place before he was drunk, is he insane? If he recollects, it is a sign of sanity, as far as it goes; he might have been sane before. I consider no man sane, who is under sufficient amount of whisky to make him drunk; then I do not consider him sane. When

a man is under "*delirium tremens*," he is insane in that se of the term; but "*delirium tremens*" is not insanity. W a man is under the influence of fever, so that he sees stra things, he is not insane; that is delirium. The mere abs of the knowledge of right and wrong, temporarily, is not sanity. I think prisoner is afflicted with insanity. W indication of insanity have you seen in prisoner? I wo dislike to mention some things. I will give you one. have been intimate for twenty years; we practiced w there were no others here; we were very intimate. He frequently come to me, and called me Aleck. He wo come and say: "All I have to do to get him, is just sin to touch him; that is all that is necessary." I have other things, in connection with this case, that to men would look like prejudice, and I would not like to be quired to mention it. At the time of the occurrence of w I mention, he was under the influence of whisky and opiu then you would see him muttering, talking to him: I have seen him frequently talkng to himself. That no evidence of insanity; the talking to himself might produced by the drink or opium; that is frequently the c dition of drunken men. I think no one who is a physi can tell morphine by the smell. I would not give morpl simply by the sight; I would dislike very much to tak on the judgment of anybody, simply by the sight. I do believe any man can tell it by the sight; I do not know l to compare the amount he used, of morphine, with tha others. I have seen him take it in very large doses. know a great many people that do it; they do not atten their business as they ought to do—as well as without They know right from wrong, probably, but I think would do it better without opium. No man under the ex sive use of either, is a sane man. If a man is excessi avaricious, and kills a man to get money, I consider him sane. In that sense, a man might be so hungry as to k man to get a piece of bread, I should consider him ins

and not responsible for it. I do not think it is possible to use opiates and liquor, without affecting the brain; I never knew any one to use them, without its affecting his brain; I believe it makes persons crazy. I think every man who uses liquor, when excited by it, is insane, and it impels him to do things he would not do without it. I do not know any crazy doctors in town; I don't know any habitually drunk, practicing medicine, with exception of prisoner. If I knew one accustomed to get drunk every day, I should consider him a crazy man. I would not like to risk him as a physician. They are many merchants and doctors who habitually drink, and yet follow business right.

Re-direct examination: I could give other indications of insanity similar to those I have given. These are the *data* on which I form my opinion. I knew him when he was under the influence of whisky and opium; he is so different that I am satisfied he is not a sane man. These are what I base my opinion on.

Dr. W. F. WESTMORELAND testified: I am cousin to prisoner; he is between fifty-five and sixty years of age, I think; he commenced the practice of medicine, I think, in 1850—in 1849 or 1850. I am a regular licensed practicing physician; I knew prisoner's position before and up to the war; I practiced with him in 1852; I have met him frequently since the war; I knew him intimately. His practice since the war has never been as good; pecuniarily he is less prosperous. In 1869, I think, he was living here. I have been about Redwine & Fox's store frequently; I think ever since the establishment of the firm, up to the difficulty. I don't know that I have seen him take many drinks, but I have seen him when under the influence of stimulants; I knew of his using opium and morphine; I have seen him take them; I know he has taken it, from the effects I have seen produced. Morphine can only be guessed at by the sight; it would be difficult to detect it by the smell; I do not know that it could be detected by the breath. Opium

would have the odor, to a certain extent; more than morphine; I am not positive with regard to that; I am not positive whether it leaves an odor or not. I practiced with prisoner from July, 1851, to the fall or winter of 1852. His demeanor was very different then from what it is now; his conduct is very different now; there is a very marked change. I have never seen him take only a few drinks; I have seen him frequently under the influence of drink, or some stimulant. I have seen him when I considered him under the influence of opiates; at other times under alcoholic stimulants, as one would from a debauch from stimulants. It is frequent to use stimulants in extreme cases; in an extreme case it would be desirable. There is a class of practitioners who do not use stimulants. In some the nervous system is more involved than others; in some the effect is more perceptible on the stomachic organs; their action is interfered with; the long use of opium and morphine would affect the brain; it will have a corresponding effect when withdrawn; when kept up a long time the effect would be in proportion to the amount taken. The effect of alcoholic drinks is varied. In some instances, disease of liver, or, in a short time, the destruction of that organ; fatty liver and various affections of the liver; sometimes affections of the stomach; in others the kidneys; the disease known as Bright's disease of the kidneys. The action of all the organs is dependent on the brain or nervous system. If the nerve is cut off from an organ, it ceases its action. The brain being affected, would affect more or less the other parts of the system. The long use of liquor impairs the mental faculties. Any lesion of the brain (mind) impairs, to the same extent, its reasoning faculties; I mean the emanations from the brain itself. While I am not a materialist, I am, to some extent. The divisions of the mind are different, according to man's fancy of authors, perception, reasoning faculties, his will, etc. What is a sound mind? One that is normal; one not changed; one in which there has been no lesion; no organic change. By lesion, we

mean a change in the substance of the organ. We may have a functional derangement without organic change. Different men are affected differently. Stimulating drink does not produce the same effects on all alike; some would die from liver disease, some from kidney disease, etc. The effect on the brain is the thickening of the membrane. There is a peculiar character; the color is changed, and other changes too tedious to mention. In some there is no perceptible change, not in the substance of the brain. Sometimes it has a softening effect on the membranes; would have an "atrophy" after a certain time. When the brain is thus affected, the mental faculties are impaired, and some instances where there is no perceptible organic change. When a man is not habitually drunk; when he gets very drunk how is his brain affected? There is more blood then; congestion of the brain, to some extent, when he is beastly drunk; when in this beastly condition he has too much blood, but it is not active; a man may take a few drinks and the brain is more active; when you get beyond that point to congestion so that the brain does not act you have coma. When a man is so drunk he cannot rise, his mind is not in a sound condition temporarily. Reason is temporarily dethroned; when he gets sober it passes off and reason returns; the normal condition is restored, and we have a return to its normal condition. Would not a mind long affected every day, through a series of three to five years, be impaired to a greater extent than a person only occasionally intoxicated? It would be.

I fill the chair of surgery in the medical college here; I have filled it since 1855. Would a wound on the head, as before described, fracture the outer covering of the head? There must be, necessarily, a fracture; I think it would have greater effect long under these influences, than if he had not been under them; the effect would be the same on the head of a drunken man as on a sober man, if their temperament was the same. There is a very great difference between individuals in the injury, or the result of a blow on the head;

one man may have a fracture driven in on the brain, in one case, while a slight injury, apparently, in another, would produce very different results. A man, where the brain is irritated by liquor, would be more liable to a permanent injury than a man of the same temperament, sober. A blow on the head of one man would not produce the same effect as on another man. Injuries of the brain induce a lesion of the brain itself, if the inflammation is of a permanent character. If inflicted on the head of one already excited, it would increase the action. In a recent injury, there would be greater sensativeness to the touch—more than one of long standing. If the inflammation subsides, the soreness subsides with it; the soreness is from the skin. A wound of a year's standing ing is not likely to be very sensative; there are some wounds of long standing that are very sensative, in a kind of neuralgic condition. The signs of insanity are so varied it would be difficult to describe them: not being able to reason rationally, *monomania;* a man may be irrational on one and good on others; some go from society, while others want to be prominent. It is owing to the phases of the insanity, as to what will be presented. What I call temporary insanity, is the result of some functional derangement of the brain—for instance, fever; he does not talk rationally: I call that temporary dethronement of reason, like when a man is drunk; that is similar. Do you consider the prisoner a man of sound mind? He has not the mind he had ten years before; he had a different mind; his reason was different; his mind is deteriorated. There is a nice distinction to be made; his mind was not sound, it was deteriorated; not the same mind he had, not his mental faculties, as he had before.

Cross-examined: I never saw or heard of the wound on his head before the difficulty.

W. F. WESTMORELAND, re-introduced: I thought I was sufficiently distinct, that prisoner's mind was not sound, and went to explain that his mind is not in a normal condition; that he is not himself. I may not have seen prisoner for sev-

lays before the shooting. For several years I have not ded him as of sound mind; I think it was affected by uses I have already stated: by intemperance, both in olic drinks and morphine. I think his mind was affec- rith insanity, if you call an unsound mind insanity. : are two kinds. Prisoner is afflicted with *dementia;* ind is afflicted with changes I have described in inebri-

ss-examined: At times I do not think he could distin- right from wrong. I can only speak of the general , that to a certain extent he was demented. His brain ot active, nor in its normal condition. Has his mind in such a condition that, if he killed a man, he did not it was right or wrong? I did not say that. That ion I could not answer positively. At times he would are, at times he would. I think, perhaps, he always s it is wrong to shoot or kill a man. Was he more de- d then than now? I think his intemperance has not so great since as it was then. The cause producing esion of the mind is evidently liquor and morphine. ause producing the effect is withdrawn. The cause was ty.

e following was agreed upon by counsel, as being the ony of Dr. Pomeroy, who was suddenly ill: Dr. roy says he has known the defendant, Dr. Harrison moreland, for the last fifteen or sixteen years; has n him intimately; had many conversations with him, n many subjects, both before and after the shooting of edwine; he has been with him much, and talked with much. He has been, since the war, a drinker of in- ating beverages, to excess, being nearly all the time r its influence; that frequently he has been in conversa- with him, on subjects to each interesting, and he would nly break from the conversation, and talk on something n to the subject of conversation, and strangely and fool- , as to say: "I must go to the mountains; have a tiger to

catch, a lion," etc.; that from his intercourse with him, he is satisfied he was not, in 1869, and now, of sound mind; that he went to see prisoner at the guard-house the next morning after Dr. Redwine was shot, and talked with him, and he then believed he was a deranged man; that he had the opinion his mind was not right before the shooting of Dr. Redwine, and talked about it then, mentioning the fact to the family of Dr. Westmoreland.

REBUTTAL BY THE STATE: Fox, one of the proprietors, and Berry and Palmer, two of the clerks of Redwine & Fox, testified that Westmoreland was constantly at the store, and bought his medicines there; that he frequently used very dangerous medicines, but used them properly, and always exercised sound judgment in putting up his prescriptions. They said he was a man of good mind and polished education—frequently quoted long passages from Virgil and Homer, etc. They said he was frequently drunk and used morphine, and that when under the influence of liquor acted like other drunken men. They all testified that he had, as far back as 1867, showed them the depression in his skull, calling it a furrow in his skull.

Fox testified that he had seen such depressions in other persons' skulls, and that they were so born. He also testified that he had frequently before ordered Westmoreland from the store when he was drunk.

Dr. Joel Branham testified that he, Dr. Crawford and Westmoreland were in the back room at the stove; that Westmoreland was cursing Mr. Rawson, who was not present, saying had he found him he would have killed him. Ladies were in the front of the store, when Redwine came and led him out, as already stated. He frequently talked with Westmoreland on medical subjects, and thought him well informed when sober. In the streets he seemed melancholy and droopy. In said conversation he was rational.

Dr. Ray testified that he knew Westmoreland intimately and knew nothing peculiar about his mind. For one who

drank so much, he showed more sense than any one witness ever knew. He did not doubt that long continued and excessive use of opium and morphine was injurious to the mind and body; many do take it without visible injury. Long use of alcoholic drinks debauches a man.

John H. James testified that in the summer of 1869, Westmoreland applied to him to rent some rooms, and talked sensibly as other men; seemed to be drinking, however.

Dr. Crawford said he had known Westmoreland for several years, and from his observation considered him of sound mind.

Question: "What is the effect of constant and excessive use of morphine and opium for four or five years?" "In some cases effect bad, in others without much effect. Sometimes it would affect the nervous system, sometimes derange the general health. In some cases it might affect the brain, in others it might not. Some are seriously affected by its habitual, long continued use, others live on to old age."

Asked as to the long continued, excessive use of liquor, he answered: Sometimes it has bad effect; some drink with impunity, apparently. I have seen some men who have been drunk twenty years. The system, however, would be more or less affected.

The following was read to him from the United States Dispensatory, page 626: "Opium is a stimulant narcotic. Taken by healthy persons, in moderate doses, it increases the force, fulness and frequency of the pulse, augments the temperature of the skin, invigorates the muscular system, quickens the senses, animates the spirits and gives new energy to the intellectual faculties. Its operation will thus extend to all parts of the system, is directed with peculiar force to the brain, the functions of which it excites sometimes even to insanity or delirium," and witness was asked if that was correct? He said it may be correct as to some persons.

Jonas Smith testified that he had long known Westmoreland, and saw him at Muhlenbrink's grocery about two hours

before the shooting and conversed with him about fifteen minutes and he spoke rationally; he did not drink while witness was there, though he appeared to have taken a drink or two. Has seen Westmoreland too drunk to attend to business; then he behaved like other drunk men.

The evidence closed, defendant's counsel stated that they would not contend that he was drunk when he shot, but was insane.

The trial began on Tuesday. Saturday evening the jury asked if they might walk about on Sunday in charge of a bailiff, and the permission was granted.

After the argument was concluded, defendant's counsel asked the Court to charge as follows: "Unless you are satisfied from the evidence, beyond a reasonable doubt, that the defendant, at the time of the alleged offense, was a person of sound memory and discretion, you are bound to acquit."

"To constitute the crime of murder, under our law, the person committing the act must be, at the time, of sound mind and discretion, and that if the jury are satisfied, from all the evidence in the case, that the mind of the accused was at the time afflicted with insanity, he is not guilty of an assault with intent to murder."

"The word 'insanity' includes idiocy, lunacy, and all other kindred forms of mental infirmity, such as mania, *dementia*," etc.

"Even if the evidence, as to the insanity of the defendant, should leave it in doubt as to whether he was insane at the time of the commission of the alleged act; if it also leaves in doubt his sanity at that time, he is entitled to an acquittal."

"Though the evidence may leave the defense of insanity in doubt, if upon the whole evidence in the case, the jury entertain a reasonable doubt as to the sanity of the defendant at the time of the commission of the alleged act, they are bound to acquit him."

"If the jury cannot say, beyond a reasonable doubt, that

he defendant was sane at the time of the commission of the lleged act, or cannot say whether, at that time, he was sane r insane, they are bound to acquit him."

"If, from the whole evidence, the jury believe the dendant committed the act, but at the time of doing so, was nder the influence of a diseased mind, and was really *un-nscious* that he was committing a crime, he is not, in law, uilty of an assault with intent to murder."

"The law holds no one responsible for his act, when his ind was so diseased at the time of the act as to be without eason, conscience and will, and when from such causes, the arty accused was an involuntary instrument of such a dis-ase and incapable of refraining from the commission of the ct."

"To convict a person of crime, he must have memory and intelligence to know that the act he is about to commit is wrong, to remember and understand, that, if he commit the act, he will be subject to punishment, and reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act and the immunity from punishment which he will secure by abstaining from it."

"If the proof shows that the mind of the accused was unsound, diseased and afflicted with insanity, the question will be whether the disease of his mind existed to so high a degree, that for the time being it overwhelmed the reason, conscience and judgment, and whether the prisoner, at the time of the shooting, acted from an irresistible and uncontrollable impulse; if so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it."

"The opinion of experts is competent testimony, and when the experience, honesty and impartiality of the witnesses are undoubted, their testimony is entitled to great weight and consideration, and is intended to aid the jury in coming to a correct conclusion in the case."

The Court refused so to charge, but on the contrary cha the jury as follows:

The defendant is charged with an "assault with inte murder" Columbus L. Redwine, by using a weapon li to produce death.

The law presumes that the defendant is innocent. State makes the charge, and must prove it. It mus testimony, remove the presumption of innocence.

An assault is an attempt to commit a violent injury o person of another. Murder is the unlawful killing human being, in the peace of the State, by a person of s memory and discretion; with malice aforethought, e express or implied. There must be an unlawful killing human being; it must be done by a person of sound me and discretion, and with malice aforethought; that m aforethought may be either express or implied.

Express malice is that deliberate intention unlawfull take away the life of a fellow creature, which is manif by external circumstances, capable of proof—such as d erate preparation for committing the act: a previous qua threats, some expressed grudge, and the like. Malice be implied, when no considerable provocation appears, when all the circumstances of the killing show an aband and malignant heart. If there has been an assault or pr cation, and an interval between the assault or provoca and the killing, sufficient for the voice of reason and hu ity to be heard, the killing shall be attributed to delib revenge, and be punished as murder.

What the law means by malice, in the crime of mu is an intention to kill a human being, in a case where law would neither justify, nor in any degree excuse th tention, if the killing should take place as intended. I death be caused by the use of a weapon, which, as used, likely to produce death, the person using it will be presu in the absence of proof to the contrary, to have used it the intention of killing. When a man commits an un

ful act, unaccompanied by any circumstances justifying its commission, it is a presumption of law that he acted advisedly, and with an intent to produce the natural and probable consequences of the act.

It is not necessary that the deliberate intention to kill should exist for any particular length of time before the crime is committed. In order to render the act of shooting a crime, there must have been a union or just operation of act and intention.

Intention will be manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused. In this case it must appear to you that the defendant, at the time of the assault, was of sound memory and discretion; that he attempted to commit a violent injury on the person of Columbus L. Redwine; that he did it with the intent to murder him by using a weapon likely to produce death.

If these facts have been shown to you by the testimony, you would be authorized to find the defendant guilty; if they have not been shown, you will find him not guilty.

The defendant must have been of sound memory and discretion. In reference to sanity or insanity, the opinions of witnesses unskilled on such subjects, are admissible as evidence, and are to be weighed by the jury, provided such opinions are accompanied by the facts upon which they are founded. The opinions of experts, medical men, are admissible and are entitled to great respect. This, like all the other testimony in the case, is intended to aid you in coming to a just and correct conclusion in the case; yet it is, at last, from the facts proven, that you are mainly to decide. You are not bound by any opinion unless it is sustained by the facts proven.

The law presumes every man of sound mind, till the contrary appears; and the burden of proof is on the defendant to show that at the time of the commission of the act he was not of sound mind.

And it ought to be made to appear to a reasonable tainty, to your reasonable satisfaction, that, at the time of commission of the act, he did not know the nature and qu ty of the act; or, if he did, did not know that the act wrong; and it devolves upon you to decide whether the fendant has, by proof, rebutted this legal presumption sanity. This is to be determined by the testimony. man has capacity and reason sufficient to enable him to tinguish right and wrong, as to the particular act in quest if he has knowledge and consciousness that the act he is d is wrong, and will deserve punishment, he is, in the ey the law, of sound memory and discretion, and is respons for his acts.

If he has not that measure of memory and discretion is not responsible, and should be acquitted. If the habi using intoxicating drinks or opiates, has created a settled sound condition of the mind; a fixed frenzy or insan whether permanent or intermittent, and such unsound went to the extent of leaving him without capacity and son sufficient to enable him to distinguish right and wr as to the particular act in question, and to deprive him of consciousness that the act he was doing was wrong, and w deserve punishment, he would not be responsible for his while in that condition.

If, by the habit of using intoxicating drinks, or opi the defendant's mind had become impaired; was in a set diseased condition, but he still had capacity and reason w sober to enable him to distinguish right and wrong, as to particular act in question, had knowledge and consci ness that the act he was doing was wrong, and deserved ishment, he would be responsible for his acts.

Drunkenness is not an excuse for crime, unless it was casioned by the fraud, artifice or contrivance of another. the defendant had the measure of mind of which I spoken, when sober, and he voluntarily used intoxica drinks, and by that means deprived himself of that mea

discretion, he would be responsible for his acts, while in
it of intoxication. The law does not permit a man to
himself of his own gross vice and misconduct to shel-
imself from the legal consequences of crime.
, at the time the act was committed, the defendant was
r the immediate influence of opiates, or intoxicating
ts, and had not the memory and discretion of which I
spoken, but would have had that memory and discre-
but for the immediate influence of the opiates or
ts, he would be responsible for his acts; otherwise, he
d not. At the time the act was committed, was the de-
nt under the immediate influence of intoxicating drinks
iates? If so, if he had been free from that immediate
ence, at that time, would he have had reason and discre-
to have distinguished right and wrong, as to the particu-
ct in question? Would he have had knowledge and
iousness that the act he was doing was wrong, and would
ve punishment? If he would have had, he was re-
sible for his act. The test is applied to his mind when
r, and not when drunk. Drunkenness, like all the other
f, may be looked to, to see whether he had the intent to
ler; but you are to take the measure of his capacity
n free from the immediate influence of intoxicating
ks, or opiates, to determine whether he was responsible.
question is not whether the defendant had a mind equal
at of others; nor whether it was equal to what it had
erly been; but whether, at the time of the commission
e act, he had the legal memory and discretion of the
which I have explained to you. If the ordinary condi-
of his mind, when free from the excitement of liquor,
regular, capable of understanding the moral quality of
cts—of speaking, reasoning and acting coherently, and
oluntarily deprived himself of reason, by intoxication,
committed an act in that condition, he is responsible;
wise, he would not be.
, after a careful survey of all the testimony, you have a

reasonable doubt of the defendant's guilt, you will ac
him. Absolute certainty is not to be attained by any n
of judicial investigation. A moral or reasonable certa
is all that the law requires, and all that is attainable.
his guilt must be made plainly and manifestly to apj
it must be shown beyond a reasonable doubt, a doubt
grows out of the testimony, and leaves the reasonable i
wavering and unsettled, cannot be satisfied from the
dence. You cannot create for yourselves a doubt, anc
upon it; you cannot raise an artificial or captious doul
order to acquit. The doubt should be real, and hon
and fairly entertained, after all reasonable efforts have
made to find out the facts. If such a doubt as that e:
you will acquit him; if such a doubt does not exi
would be your duty to convict. You are to receive the
from the Court, and the testimony from the witnesses;
you will apply your conclusion as to the law that
receive from the Court, and your conclusion as to
facts you receive from the witnesses together, and,
your judgment of both, form your verdict. The Court
presses no opinion as to what has or what has not
proven. In civil cases, the preponderance of testimor
considered sufficient to produce mental conviction. In c
nal cases, a greater strength of mental conviction is
necessary to justify a verdict of guilty. Put far from
all prejudice or bias; solemnly, carefully and impart
consider the case, and a true verdict give according tc
evidence. As you may find him, guilty or not guilt
express it in your verdict.

The jury found the prisoner guilty. His counsel m
for a new trial, upon the following grounds:

The Court erred, 1st. In holding Glazener to be a co
tent juror. 2d. In refusing to dismiss the panel of j
selected by the bailiff. 3d. In allowing Howell to tell
prisoner said, when he did not remember all he said.
In refusing to let Calhoun tell what prisoner said abou

round on his head, who inflicted it, etc. 5th. In refusing
) charge as requested, in part and in whole. 6th. Because
ie charge, as given, was inapplicable to the facts of the
se. 7th. Because the verdict was contrary to the law and
stimony. 8th. Because the jury, after they were impan-
:led and charged with the consideration of the case, several
mes separated, and walked in public places, through public
reets, and along public thoroughfares, where large crowds
' persons were assembled. 9th. Because written papers
ere received and sent out by some of the jurors, while they
ere confined, and carpet bags received by them, and com-
unications were had with persons who were not jurors.
0th. Because it was communicated to the jury, that one
resham, an officer of Court, had made a bet on prisoner's
nviction. 11th. Because the jury several times were fur-
ished with ardent spirits, had it in their rooms, and used it
y drinking the same.

As to these last grounds, the following affidavits were
ad:

EORGIA—FULTON COUNTY:

MANSON STROUD, being sworn, says he was the bailiff
ho had charge of the jury in the case of The State *vs.*
larrison Westmoreland, charged with the offense of assault
ith intent to murder, tried at the present term of Superior
ourt of Fulton county; that he had charge of said jury
om the time they were impanneled, until they were dis-
harged from the consideration of the case, to-wit: from
Vednesday, the 10th day of May inst., until Tuesday morn-
ng following; that said jury was taken to the Air Line
louse, on Pryor street, to take their meals and sleep; that
:veral times after the case was submitted to the jury, said
ry separated; that it was impossible for deponent, as an
ficer, to control some of them; that on Sunday morning,
ter breakfast, while taking a walk, three of the jurors,
ainst the consent and remonstrance of deponent, separated

from their fellow jurors, and for some time refused to accompany their fellow jurors. One of them cursed deponent, and said they had a right to go where they pleased; that on Sunday, after their return from the woods to the Air Line House, four of the jurors were in a room up stairs, while the other eight were below stairs; that in the afternoon of said Sunday, about three o'clock, the jury insisted on taking another walk, and against the wishes and remonstrances of deponent, they left the Air Line House, passed by the Stubblefield House and American Hotel, where a crowd of persons were assembled; went through the passenger depot to Loyd street, and thence to Decatur street, to the city cemetery; that on the route, they saw, and came in contact with various persons; that they passed through some of the most public streets and thoroughfares in the city, meeting persons going to, and from church, and other places; that three of said jurors stopped at a church, and refused to leave, and deponent was compelled to leave them; that one of the jurors was clean shaved, and deponent accused him of leaving the room to be shaved, which he denied; that carpet bags containing clothes, as deponent supposed, were sent to some of the jurors; one of them he did not examine; that some of the jurors received and sent out written papers. One juror went to his house, and talked to his wife. Deponent found it impossible to control them.

The jury knew of a bet being made by one Gresham, an officer of Court, on the conviction of the prisoner. Deponent informed them that such bet had been made. On Sunday morning, the jury seemed to be quite lively. Deponent says that he used his best endeavors to control said jury, but was unable to do so, they asserting that the judge said they could go where they pleased. Deponent knows that the jury had liquor (ardent spirits) in their room, more than once, and used the same. MANSON STROUD, L. C.

Sworn to and subscribed before me, May 19th, 1871.

THOMAS SPENCER, J. P.

)RGIA—FULTON COUNTY:

person, before me, came John Eddleman, who, being sworn, deposes and says, that he heard Mrs. Jackson, of T. C. Jackson, who was on the jury who tried the dant, Westmoreland, ask the said Jackson when he oming home, and he told her that he did not know ier he would ever get home or not.

is was on Sunday, when the jury were walking out on r street.

JOHN EDDLEMAN.

n to and subscribed before me, this June 10th, 1871.

HN MILLEDGE, Jr., Notary Public.

RGIA—FULTON COUNTY:

P. Westmoreland and T. W. J. Hill, two of the attor- for Harrison Westmoreland, in the above stated case, ; sworn, say: That, after the trial of said case, hearing the jury had been guilty of misconduct, they called on on Stroud, the bailiff who had charge of the jury, for urpose of ascertaining the truth of the matter. That, st, he was reluctant to give any information, but finally us all that transpired, within his knowledge. All the given us by him was reduced to writing, in his presence, ead to him and assented to by him. At his request, we ed to state in the affidavit that he furnished the jury spirituous liquors, and that he knew it was wrong. He stated to us that he had had charge of many juries, and was the most unmanageable jury he ever had under ge. He stated to us that three of the jurors drank a of whisky by themselves. These facts, at his request, omitted in his affidavit. These deponents say that in ffidavit, no fact was left out, except at his own request.

T. W. J. HILL,

T. P. WESTMORELAND.

n to and subscribed before me, June 13th, 1871.

M. T. NEWMAN,

Notary Public, Fulton county, Georgia.

GEORGIA—FULTON COUNTY:

Harrison Westmoreland, the defendant in the above stated case, and L. J. Gartrell, T. P. Westmoreland, T. W. J. Hill and Milton A. Candler, the attorneys for Harrison Westmoreland, being sworn, say: That the facts stated in the affidavit of Manson Stroud, the bailiff who had charge of the jury in said case, made before Thomas Spencer, Justice of the Peace, on the 19th day of May, 1871, and the facts stated in the affidavits of T. A. Poole, made before J. H. James, Notary Public, on 3d June, instant, and the facts stated in the affidavit of J. S. Keith, made before Daniel Pittman, Ordinary, on 6th June, instant, relative to the irregularity and misconduct of the jury, and communication with them, did not come to the knowledge of deponents until after the trial of said case, and the jury had been finally discharged from the same, after they had returned a verdict.

H. WESTMORELAND,
T. W. J. HILL,
MILTON A. CANDLER,
LUCIUS J. GARTRELL,
T. P. WESTMORELAND.

Sworn to and subscribed before me, June 12th, 1871.

W. N. VENABLE, Clerk.

GEORGIA—FULTON COUNTY:

Thomas A. Pool, being sworn, says he was one of the jurors impanneled to try the defendant in the above stated case; that Manson Stroud was the bailiff who had charge of said jury, from the time they were impanneled until they were discharged from the consideration of the case; that the jury was taken to the Air Line House, on Pryor street, to take their meals and sleep; that, on Sunday before the trial was complete, the jury took a walk to the woods; while out walking, all of the jurors stopped at a church, some separated from their fellow-jurors, and the bailiff had to go back after them. On Sunday morning, while at the Air Line House, one of the

ırs went out of the room and got shaved; he said the price having was a *quarter*. Some of the jurors went to the y, unaccompanied by the officer; some of the jurors re- ed carpet-bags; some jurors received written notes. De- ent mentioned to bailiff he ought to read the notes, which eclined doing. The jury, in the afternoon of Sunday, another walk, going up Pryor street to the corner of Stubblefield House, across to American Hotel, thence to shed, through the car shed to Loyd street, thence to De- r street, and thence to the cemetery. While on the way, nent heard remarks made by persons to the bailiff and . Several persons were at the cemetery while the jury there; the jury returned by a different route to the Air House. Deponent protested against such conduct, and tioned the impropriety of the same to the bailiff. Some ie jurors seemed to be uncontrollable. On Sunday, one conversed with a person, (deponent supposed his broth- The jury knew of a bet being made by one Gresham he verdict of the jury; the fact was communicated by ailiff. The jury, several times during the trial, had ar- spirits, and used the same by drinking, and after the had made up their verdict, and before they returned it ourt, they had and used ardent spirits.

THOMAS H. POOLE.

rn to and subscribed before me, June 3d, 1871.
H. JAMES.

)RGIA—FULTON COUNTY:

L. Keith, being sworn, says that he is the proprietor of Air Line House, in the city of Atlanta; that the jury nneled to try Harrison Westmoreland, indicted for "an ılt, with intent to murder," at the present term of the rior Court of Fulton county, took their meals and slept ie house of deponent; that, during the time the jury at the house of deponent, he let the bailiff who attended jury have ardent spirits, by the bottle, three different

times; said bailiff informed deponent the liquor was for said jurors. J. L. KEITH.

Sworn to and subscribed before me, June 6th, 1871.

DANIEL PITTMAN, Ordinary.

In reply thereto, the following affidavits, were read by the State's counsel:

GEORGIA—FULTON COUNTY:

Personally appeared before me, the attending officer, Manson Stroud, the bailiff, who had charge of the jury in the Westmoreland case, and for explanation of his affidavit made in this matter, on the 19th of May last, deposes and says: The jury was kept in the Air Line House; that they ascended one flight of stairs, and at the landing had a room called their sitting room; from the hall, on the same floor, was a platform, leading about twenty or twenty-five feet to the privy, the way to which is planked up so high that no one can go to or from it, except by the passway or hall on which their sitting room is situated. They had another room up stairs, (with stairway leading from the sitting room hall to the third floor hall.) The only separation of the jury known to deponent, was, that the jury being troubled with bowel affections, frequently, one or more, went from the jury to this privy, but on going and coming could not have any communication with the outside world. And one time, on Sunday, four of the jury being sleepy, this deponent let them stay in the sleeping room, he having locked them up there and kept the key with him, and he staid with the other eight in the sitting room, where he could see the stairway going to the sleeping room. This sleeping occurred between ten o'clock A. M., and the dinner hour; deponent waked them up at the dinner hour.

The separation alluded to, while out walking Sunday morning, was in this wise: The jury had been permitted in open Court, by consent of the counsel and order of the

court, to walk out in my charge during Sunday. About eight o'clock A. M. they went directly south from the hotel to the woods, and got back about ten o'clock. In coming back, when we got to the corner of Washington and Mitchell streets, at the Baptist Church, some of the jury wished to go back to the Air Line House, and part wished to go towards the depot.

Jackson, Barrett and Carlton stopped at the church steps, on the corner of said streets; the others went down Mitchell street about forty or fifty yards. I stood where I could see both parties, and asked the three to go on with the others; they hesitated and grumbled, because the majority would not go their way. One of them did curse the deponent, and he started off to the majority, and before we got to them, these three came on and joined the body. Nobody passed, during their separation, either party, and the separation did not last three minutes, if that long. That he opposed the second walk in the evening, only because he did not feel like taking a long walk; they did pass through the streets as stated, and did meet persons going and coming, but no one spoke to them, nor they to any one; this is all I meant by coming in contact with persons, and so stated to the writer of the other affidavit when it was made and written. The three jurors stopping at the church is the incident already mentioned. No other stopping or being near a church occurred, and my leaving of them was starting to the majority, as aforesaid.

One of the jury was shaved, but he said he had his tools in the room, and deponent does not think there was any barber shop in the hotel: just before this, some one had brought this juror a small carpet-sack, saying it had Mr. Carlton's clothes in it; the key was to it, and as Mr. Carlton needed clean clothes, deponent let him have it, and, being assured it contained only a change of clothes, did not examine it. He supposes the shaving tools were in that sack. No other carpet-sack was handed to any juror, except to D. R. Prothro,

and deponent knows it had nothing in it but a change of clothing, for he examined it.

If any note was received by any juror, this deponent does not know it. Carlton wrote a note to his family, telling them where he was and asking for a change of clothing. Agricola, a baker, wrote a note to his wife, telling her how much bread to bake for customers.

These notes were read by me, and I suppose the jury, or some of them, may have read them. Carlton's I sent out, and his carpet-sack was returned in answer to it. I concluded it might be wrong to send Agricola's—the negro who wished to carry Agricola's note heard it read, and heard him and me talk of it, and I remarked: "You have heard what Mr. Agricola said to me—go and tell his wife." This is all I know of notes, to or from the juror.

The going of a juror to his house and talking with his wife, was in this wise and not otherwise. Jackson's house is directly on the route from the Air Line House to the woods, and near the suburbs; in going out Sunday morning, they passed by without stopping; in coming back, I took the jury in to the well to drink. Until we got in, I did not know it was Jackson's house. While the jury was taking water, Mrs. Jackson came on the piazza; her husband asked her if she was well and was going to church, and where her sister was? She answered these questions, and neither said anything more; nor were they closer than eight feet to each other, and I was between them. He did not go into the house, nor did she come out, and we staid on the lot only long enough to draw a bucket of water and all to drink—say five or ten minutes.

As to the betting, this deponent says that, some time during the trial, the deputy sheriff, Perkerson, told deponent, "if Gresham (bailiff) speaks to a juror, or comes near one, bring him directly to me." I asked him why, and he said Gresham had been betting on the verdict, but did not say which way, nor had I any idea which way he bet. When we

; to the room, I cautioned the jury not to let Gresham
: near or speak to them, without telling me; and when
l why, I told them what Perkerson had told me; I did
nply as a caution, to guard against the intimated ap-
:h by Gresham.

ıe only liquor had by the jury was as follows: On three
'ent mornings, the jury wished a morning dram, and on
occasion, I gave them a pint of rye whisky; deponent
tasted it one morning; three of the jury, he thinks, did
ıste it; he thinks the jury had a pint on each of the fol-
ıg days, to-wit: Wednesday, Friday and Sunday; they
ıo more, and this deponent took care that no one should
more than a morning dram.

l I meant by the jury being uncontrollable was, that I
not prevent such separation as aforesaid, going to the
, etc.; but the jury behaved as well as a jury could do,
rere very gentlemanly, except the one who cursed me
se I would not take the jury his way in returning, as
aid.

has heard the affidavit of the juror, Poole, read, and
regoing and following explains it. He denies refusing
d any note sent to the jury, and does not remember any
received, or Poole saying any such thing as to reading

No remarks were made *en route* to the cemetery, ex-
hat, in going, they were met by a negro with the carpet-
ör Prothro, (a juror) and asked to deliver it to him;
not know Prothro's name, but pointed him out, and I
old him to go and leave the carpet-sack at the Air Line
', and we went on, and when we got back, got the sack
othro; that is the carpet-sack already aluded to. If
her remarks were made deponent does not know it.

cemetery covers perhaps over twenty-five acres of land,
ersons were there while the jury were; but the jury
› communication with any one there.

le did not mention to me any impropriety in the jury
otest against their conduct; he was the main man insis-

ting on having the liquor, and he behaved no better than the other jurors. When Carlton's brother brought his carpet-sack, Carlton said something to me about his business in his brother's presence, and in the hearing of the jury, if they were listening. Carlton was in the jury-room and his brother outside; they did not speak to each other at all.

There was no other incident to which Pool's affidavit can allude but this; if so deponent does not know it. All these facts were told to the writer of the first affidavit before it was written; and I requested him to put them in, but he said the other side would make any explanation of what I might make affidavit to, and I, supposing he had a right to put it down his way, suffered it done; and I came and told the solicitor that I wished him to explain it before it came up, and he said he would, or words to that effect.

MASON STROUD, L. C.

Sworn to and subscribed before me, this the 9th day of June, 1871. W. R. VENABLE, Clerk.

GEORGIA—FULTON COUNTY:

Personally appeared before me, the undersigned, John M. B. Carlton, who, being sworn, deposes and says: that he took the carpet-sack to his brother, while on the Westmoreland case, and delivered it in presence of the bailiff, and that it had nothing in it but a change of under-clothing, and a handkerchief or two; that his brother's wife had been expected to go from home, and his brother asked if she had left, when deponent replied, "Yes." The juryman Carlton was then asked if he had collected certain rent, and he answered, but what the answer was is not now remembered. This, he believes, is all that was said; and it was rather done by using the bailiff as a medium, than by direct conversation Nothing was said about, or even hinting at, the case.

JOHN M. B. CARLTON.

Sworn to and subscribed before me, 19th June, 1871.

JETHRO W. MANNING, Notary Public, F. C., Georgia.

GEORGIA—FULTON COUNTY:

Personally appeared before me J. R. P. Carlton, who, being duly sworn, deposes and says: that he was one of the jury which tried H. Westmoreland at this Term. On Monday morning between daylight and sunrise, he went out of the back door of the Air Line House, about fifty steps into the back door of a barber-shop which fronts on Alabama street; the front door of the shop was closed; no one was present when he entered except the negro boy who cleans up the shop. I asked him if I could get a shave quickly? he said, "yes," and called to the barber, who had not gotten up; he, a negro, came in and shaved me. I paid for the shave to a white man, who had just come in, and went back out of the back door of the shop into the back door of the hotel to the jury room. The front door of the shop was opened just as I was leaving, but no one was present while I was there except as aforesaid; and I spoke to no one while I was from the jury, nor any one to me except as aforesaid.

When the jury were passing the Baptist Church, Sunday morning, there was a temporary separation of the jury by several of them stopping at the church steps, while the others walked some distance down Mitchell street; the bailiff was present; it was a mere temporary stop, to see if the jury would not go down Washington street, and no one was present but the jurymen and bailiff, and no conversation was had with any one but the jury and bailiff, and that only as to the street on which he wished the jury to go.

He further states that he had requested the bailiff on Sunday morning to bring some one to shave the jury, and he did not, and deponent went to the shop Monday, as aforesaid, with no intention of doing wrong, thinking it could do no harm. J. R. P. CARLTON.

Sworn to and subscribed before me, 11th June, 1871.
S. B. HOYT, Notary Public.

GEORGIA—FULTON COUNTY:

Personally appeared before me, the attesting officer, Thomas C. Jackson, a juror who tried Harrison Westmoreland, and being sworn deposes and says: that he has seen and heard read the affidavit of Manson Stroud, constable, made on the 19th of May, 1871, before Thomas Spencer, Justice of the Peace; of Thomas H. Poole, made June 3d, 1871, before J. H. James, Notary Public; and of J. L. Keith, made 6th June, 1871, before Daniel Pitman; and the explanatory affidavit of Stroud, made this day, before W. R. Venable, Clerk; and that this last affidavit of Stroud substantially states the truth, as to the conduct of the jury while on said case.

At one time while walking, the bailiff, Stroud, did not seem disposed to go where the jury wished, and this deponent reminded him of the Judge's permission to walk out, and did use an oath in remonstrating with the bailiff; he is in the bad habit of cursing when fretted, and was a little fretted on that occasion.

I believe the jury behaved well. The jury had but little difficulty in the case, the trouble with making up the verdict sooner was because Poole and Harper did not agree as soon as the others. T. C. JACKSON.

Sworn to and subscribed before me, this 9th June, 1871.

SIDNEY DELL, Notary Public, Fulton county, Georgia.

GEORGIA—FULTON COUNTY.

Personally appeared before me, the attesting officer, R. B. Hicks, James W. Coker, William J. Barrett and L. F. Heflin, who being duly sworn, depose and say: that they have read the affidavits alluded to in T. C. Jackson's affidavit taken in this case, they were of said jury, and believe that the explanatory affidavit of Stroud substantially speaks the truth as to the conduct of the jury on said case.

They futhermore say that they were the part of the jury which went down Mitchell street, when some of the jury

stopped at the Baptist Church Sunday morning; that when they had gone thirty or forty yards and found that some of the jury had stopped, they sat down on the side-walk, and waited for them not exceeding two or three minutes, when they came on and joined the body.

During this separation nobody spoke to any one of the majority of the jury; nor any one of them to any one; nor did they speak to each other about the case or trial. Furthermore, they remember that Carlton and Barrett refused to drink any of the liquor brought to the jury-room; the whole quantity used is correctly represented by said explanatory affidavit.

R. B. HICKS.
JAMES W. COKER.
L. F. HEFLIN.
WILLIAM J. BARRETT.

Sworn to and subscribed before me, this 12th June, 1871.
W. R. VENABLE, Clerk.

GEORGIA—FULTON COUNTY.

Personally appeared before me, W. J. Barrett, who being duly sworn, deposeth and says: that it was Monday night after the Westmoreland case was argued, and when the jury was taken from the jury-room to be taken to supper, that the bailiff, Stroud, warned the jury not to let the bailiff Gresham come near or speak to them, (as stated in Stroud's explanatory affidavit.) He did not say on which side the bailiff had bet.

W. J. BARRETT.

Sworn to and subscribed before me, this 12th June, 1871.
W. R. VENABLE, Clerk.

GEORGIA—FULTON COUNTY.

Personally appeared before me, Thomas G. Gresham, who being duly sworn, deposeth and says: that on Monday evening after the Westmoreland case was argued, and the jury had been carried to the jury-room, he was with a party of gentlemen at the store of Redwine & Fox, when some gentleman

proposed to give me a hat if the jury found Westmoreland guilty; and I said I would give him one if they did not. I never made any other bet as to said case, and after that I did not go near the jury, nor did I see them till they brought their verdict into Court on Tuesday morning.

Furthermore, he says he had nothing to do with the jury during the trial, nor spoke to any of them during the trial. Indeed, he was the bailiff of the Grand Jury, and was generally outside of the court room, and said little wager was made by him more as a matter of sport than otherwise.

T. G. GRESHAM.

Sworn to and subscribed before me, 12th June, 1871.
W. R. VENABLE, Clerk.

The motion for a new trial was overruled by the Court, and counsel for prisoner excepted and alleged said ruling and decision as error.

GARTRELL & STEPHENS; HILL & CANDLER; T. P. WESTMORELAND, for plaintiff in error.

J. T. GLENN, Solicitor General; A. W. HAMMOND & SON, for the State.

MONTGOMERY, Judge.

The leading features in this case present a striking similarity to those of *Choice against the State*, 31 Georgia, 424. In each case the prisoner takes mortal offense at an act towards himself done by his victim, which the latter was perfectly justified in doing. In each the prisoner is a man of dissipated habits; drinks, and broods over his imaginary wrong until he works himself up to the point of shooting down a man walking peaceably along the streets of Atlanta at the time. In each, after the commission of the crime, the attempt is made to screen the offender from punishment by a plea of insanity, resulting in each case, it is singularly

enough said, from an injury on the head, received some years before, and from superadded dissipation. Only in the result of the crime do the cases diverge from each other in any material fact. The victim in the present case escaped the death inflicted in the other by a more skillful marksman. Has the impunity with which the prisoner escaped in the one case been the temptation to the commission of the crime in the other?

Many points are made in the bill of exceptions. The following, it is believed, embraces all that are material:

1. It is alleged that in impanneling a jury, one of the jurors said he had formed and expressed an opinion from hearsay, but could give the prisoner a fair trial. The Court refused to exclude him for cause, and the prisoner challenged peremptorily. The jury was obtained before the prisoner exhausted his challenges. This refusal of the Court is alleged as error. That it is not error, see the following authorities: *Mitchum vs. The State*, 11 Georgia, 636; *Anderson vs. State*, 14 Georgia, 710; *Griffin vs. State*, 15 Georgia, 476; *Jim vs. State, Ibid*, 534; *Mercer vs. State*, 17 Georgia, 146; *Wright vs. State*, 18 Georgia, 383; *Costly vs. State*, 19 Georgia, 614; *Thompson vs. State*, 24 Georgia, 297. The Court is the trior, and no error lies to his *finding: Galloway vs. State*, 25 Georgia, 596. See 22 *Georgia Reports*, 556; 25 *Georgia Reports*, 57.

2. Again, it is objected that some of the jurors were summoned by a bailiff in attendance upon the Court, and not by the sheriff. For this cause the array was challenged. The Court overruled the objection, and this is excepted to. We fail to perceive the validity of the objection here also: *Conner vs. State*, 25 Georgia, 515; *McGuffie vs. State*, 17 Georgia, 497.

3. Another exception is, that the Court permitted a witness to testify to all of a conversation of defendant heard by him, there being parts of it which he did not hear. It may be remarked that the conversation was a desultory one, ex-

tending through an hour or two, detached portions of w were heard by witness, as they went in and out of his p ence, all the witnesses during the course of the trial b placed upon the stand. We see no error in this. "If one of a conversation is relied on as proof of a confession of crime, the *prisoner has a right to lay before the Court* whole of what was said in that conversation." 1 *Greenl. Evidence*, section 218; 2 *Brod. and Bing.*, 290, 291. nowhere said he may require the prosecution to do it. the contrary, it is admitted "subject to all the consequ of having it considered as part of his evidence." 2 *B. and B.*, 191.

4. Defendant attempted to give in evidence his own ings as to when a certain injury was inflicted upon him, who inflicted it, made to his physician several days after commission of the offense for which he was indicted. rule is that complaints of physical suffering made to a sician may be testified to by him to show the extent of injury sustained by the prisoner: 1 *Greenl. Ev.*, section The rule goes no further.

5. The next objection is that the Court refused to ch the jury that if they had a reasonable doubt as to the s of the prisoner, they should acquit. The Court did ch the jury that the law presumes sanity until the contra made to appear, and that the burden of proof on this p was on the defendant; "and that it ought to be made to a to a reasonable certainty, to your reasonable satisfaction, at the time of the commission of the act, he did not kno nature and quality of the act, or if he did, did not know the act was wrong." "If a man has capacity and reason ficient to enable him to distinguish right and wrong as t particular act in question, if he has knowledge and consc ness that the act he is doing is wrong, and will deserve ishment, he is, in the eye of the law, of sound memory discretion, and is responsible for his acts. If he has not

measure of memory and discretion he is not responsible, and should be acquitted."

After charging the law correctly as to the effect of habitual drunkenness, the Court added: "If, after a careful survey of all the testimony, you have a reasonable doubt of the defendant's guilt, you will acquit him." We think the charge as favorable to the defendant as he could have asked. It certainly warranted the jury in finding the defendant insane, upon less evidence than that required by the fifteen Judges of England, in their answers to the questions propounded by the House of Lords, after the trial of McNaughton for killing Drummond, in 1843, which answers were approved by this Court, in the *Choice* case, as sound law. Indeed, the Judge charged, in effect, all that was asked of him by the defendant. He charged that if the jury had a reasonable doubt of the prisoner's guilt, they should acquit. As he was clearly guilty, and so admitted by the line of defense adopted, unless he was insane the charge was tantamount to telling the jury that, if they had a reasonable doubt of the prisoner's sanity, they should acquit.

6. The next ground of alleged error is the refusal to grant a new trial for misconduct on the part of one or more jurors in the jury-room, during the progress of the trial which lasted several days, in that "written papers were received and sent out by some of the jurors, while they were confined, and carpet-bags received by them, and communications had with persons who were not jurors." This is sustained by the affidavit of one of the jurors, but fully explained by the affidavits of the bailiff in attendance on the jury, and of other jurors, showing no injury resulted to defendant. This Court has, however, repeatedly decided that a juror will not be heard to impeach his own verdict: *Bishop vs. The State*, 9 Ga., 125. *Mercer vs. The State*, 17 Ga., 146.

7. Another objection to the verdict was that the jury were informed that a bet had been made by a named person as

to the result of their verdict. The affidavits show nothing more on this point was conveyed to the jury the mere information that a bet had been made by the son named, who was in no way connected with the case the result of their deliberations. It does not appear "any unfair trick or artifice was employed" to influenc verdict: Wharton's Am. Cr. Law (3d ed.,) title "New T p. 1026.

8. It was also shown, by affidavits, that liquor had conveyed to the jury by the bailiff in attendance them, and that one of the jury had gone out of the room into a barber's shop to be shaved, without the k edge of the bailiff. These two facts certainly threw the upon the State to show that the prisoner had not bee jured by the irregularities: *Monroe vs. The State*, 5 Ga The explanation is that a small quantity of liquor, only furnished, and that none of the jury were at any time i its influence. The practice of furnishing liquor in any q tity, to a jury, while they have a case under consider cannot be too strongly reprehended, and the bailiff sh have been, and probably was, punished; but the explan we think, disarms the objection of its force: Wharton's Cr. Law (3d ed.,) 1020. The other fact was sufficientl plained by the State, showing that the absent juror versed with no one on the subject of the trial, durin absence, and returned to the jury-room as soon as the pose for which he had absented himself was accompl Other irregularities are charged against the jury, but en refuted by the affidavits introduced by the State. See *vs. The State*, 10 Ga., 525, pt. 2. *Roberts & Copenhav The State*, 14 Ga., pt. 4.

9. The usual objections to the verdict, as contrary t and evidence, and to the charge as inapplicable to the are made and overruled.

Judgment affirmed.

JOHN H. GAVAN, plaintiff in error, *vs.* JOHN ELLSWORTH, defendant in error.

1. Continuances are in the sound discretion of the Judge, and this Court will not interfere with that discretion, unless it has been abused, to the injury of the party complaining.
2. When the witness of one party has been examined by both sides, and has left the stand, the other party has no right to recall him that he may cross-examine him upon a fact stated. If he pleases he may recall and examine him as his own witness.
3. A ground of error, not distinctly set forth and excepted to in the bill of exceptions, will not be considered by this Court merely because the facts are stated in the bill of exceptions.
4. The testimony of a witness, since diseased, given before the magistrates on a commitment trial for an assault with intent to murder, may be used against the defendant in a civil suit for damages by the person injured.
5. The verdict of the jury is sustained by the evidence in this case, and as the Judge below has refused a new trial, this Court will not interfere.

Continuance. Witness. Evidence. Before Judge HOPKINS. Fulton Superior Court. April Term, 1871.

In 1869, in an alley between the National Hotel and the Norcoss building, Atlanta, Ellsworth received certain blows upon his head, which, he supposed, were inflicted by John Gavan. Gavan was arrested, charged with an assault with intent to murder Ellsworth. One of the Justices who presided at the commitment trial was Thomas Spencer, Esq. The Justices directed one Holmes to take down the evidence, and he did so. But, for his own convenience, Spencer also took down the evidence in short-hand, and subsequently wrote it off in long-hand. Gavan was bound over, and an indictment therefor was pending against him during the trial herein mentioned. Ellsworth brought trespass *vi et armis* against Gavan for said injuries. When this cause came on for trial, Gavan moved to continue for the absence of Sarah Bird, John Johnston, M. E. Jones and Miss Kate Wright. He said they resided in this county, were subpœnaed, and were

not absent by his permission, directly or indirectly; that he expected to have their testimony at the next term, and that the showing was not made for delay, but to get the evidence. He said that he expected to prove by Sarah Bird that she was present, and between Ellsworth and himself, at the time Ellsworth was stricken in the alley, and that he (Gavan) did not strike Ellsworth. Sarah Bird was temporarily absent from the city, on a bridal tour. He said Jones was a slater, residing here, till two or three weeks before the cause was called, and he had recently learned from Jones' friends that he was absent in Tennessee, but he could not learn his exact whereabouts, and could not take his interrogatories. He expected to prove by Jones that he (Gavan) did not strike Ellsworth, and that he (Gavan) was not in the alley when Ellsworth was struck, but in the street; and, further, that Jones would swear that he (Gavan) did not strike him (Jones). The Court then asked Gavan, "Did you not swear that you expected to prove by Sarah Bird that she was between you and Ellsworth, at the time Ellsworth was struck in the alley?" Gavan answered, "Yes." "Did you not swear that you expected to prove by Jones that you were not in the alley, but in the street, at the time Ellsworth was struck?" Gavan answered that he did not swear that he expected to prove by Jones that he (Gavan) was not in the alley, but in the street, at the time Ellsworth was struck; if he made such a statement it was through mistake, for he (Gavan) was not in the street. Without more the Court ordered the trial to proceed. Gavan's counsel complain that he had not completed his showing as to the other witnesses. The Court certified that he had completed his showing for continuance.

Ellsworth testified that he, Edwards and Weaver were in Gavan's saloon, and some unpleasant words and a difficulty occurred between him and Gavan, about making change when Ellsworth paid for what he and his friends drank; that they left the saloon, and afterwards, coming back into

the alley, he was struck by some one, over the head, and that the injury had disabled him from being an engineer. His physician described his appearance when hurt, and said that he believed that the inner table of his skull was broken, and pressing on the brain, though the outer one was not, and though the skin was not cut or bruised; that this might be done by a round substance, like a policeman's baton.

Weaver testified that he saw Gavan strike Ellsworth over the head with such a stick, and told all about the difficulty, as he understood it. While he was testifying he said that Edwards was, since that, killed on the Western and Atlantic Railroad.

Plaintiff's counsel then proposed to prove by Spencer what Edwards swore to on the commitment trial. Defendant's counsel objected, upon the ground that it was not shown that Edwards was dead. Being reminded that Weaver swore that Edwards was killed, they said they remembered it, but did not know that the question was asked with a view of laying a foundation for Edwards' testimony, and therefore did not cross-examine Weaver on that point, and asked that Weaver should take the stand again that they might cross-examine him as to that. The Court refused to let them put him back thus for that purpose. They did not offer him as their own witness. Defendant's counsel then objected to Spencer, upon the ground that this cause and that before the committing magistrates were not substantially between the same parties, and upon the same issue. The objection was overruled, and Spencer gave Edwards' version of the affair, which was substantially what Weaver's was, and that he saw Gavan hit Ellsworth. Spencer testified with his copy of Edwards' evidence in his hand, but only referred to it when asked to do so by defendant's counsel, (as the Court certifies.) The bil of exceptions gives a version of this matter not easily understood in connection with the Judge's notes appended to his certificate.

Gavan gave his version of the quarrel about the change, etc., but denied that he struck Ellsworth, or was present when he was struck; he said being warned by one of the women who kept his bar, he had gone into the bar before the blow was struck—it was struck in the alley. The version of it by Gavan's barkeeper and one of the female bar-tenders strongly corroborated Gavan's statements.

The jury found for plaintiff for $3,092 50 and costs. Defendant's counsel moved for a new trial, upon the grounds that the Court erred: 1st. In refusing a continuance. 2d. In admitting Spencer's evidence, and because the verdict was contrary to law and evidence, and excessive. The Court refused a new trial, and that is assigned as error.

THRASHER & THRASHER, for plaintiff in error.

L. J. GARTRELL; HENRY JACKSON & BROTHER, for defendant.

McCAY, Judge.

1. We do not think it was error in the Court to refuse the continuance. Necessarily continuances must vest largely in the discretion of the Court, and the facts in this case show the propriety of the rule. Evidently the Judge was led, from the contradictory statements made in the showing, to discredit it, and to think the motion to continue a mere pretext for delay. We cannot say he was not justified in this conclusion. He was an eye witness and ear witness of what took place, and there is enough of the scene transmitted into the bill of exceptions to make us suspect more.

2. As we understand the bill of exceptions and the Judge's certificate, the thing complained of in the ruling of the Court as to the witness, Weaver, was no error. Weaver had been examined, and in the course of his examination had stated Edwards was dead. The plaintiff, in the progress of his case, offered to prove what Edwards swore on the former trial;

the defendant asked that he be allowed to to recall Weaver and *cross-examine* him as to his statement of Edwards' death. This the Court refused. We do not think this was wrong. The Court distinctly stated that he did not refuse to permit defendant to introduce evidence on the question of Edwards' death. The point was, that he refused to permit defendant to recall plaintiff's witness to cross-examine him as to a fact stated by him in his direct testimony—and this was right. It would be improper for this Court to interfere with the discretion of the Court below in the conduct of a cause on such a point. But we *concur* with the Judge. The defendant had his opportunity to cross-examine the witness, and if for *any* cause he saw fit not to go into a question, he must take the consequences.

3. There are some facts stated in the bill of exceptions, which, in the view we take of this record of the evidence of Edwards', present matter of which the defendant might justly complain. We think the proper source from which to get Edwards' testimony was the memorandum of it, as taken down under the direction and supervision of the Court, and not Mr. Spencer's short-hand notes, however correct they may have been. But it does not appear from the bill of exceptions that *this* objection to Spencer's testimony was made. He was objected to, 1st, because Edwards' death was, as it was claimed, not proven, but this was abandoned; and, 2d, because the trial was not of such a character as made Edwards' testimony in that case evidence in this, and also for some supposed defect in Spencer's memorandum and mode of testifying. But there was not, as appears by the bill of exceptions, any objections on the ground that the memoranda of the Clerk was the best evidence. We do not therefore go into this question. Were the point distinctly made we should hesitate to sustain the Judge, though much might be said in favor of the judgment if he had so adjudged. Spencer was himself one of the Court, and he states that he recollected the facts independently of the notes.

4. We think the authorities are in favor of the rule ad by Judge Hopkins, in this case, on the admissibility of wards' testimony, on the former trial. The defendant party; the issue was the same. Our Code, section provides that the testimony may be used, if the parti *substantially* the same, and the issue substantially the It seems to us that the facts here make the case put b Code. The issue is precisely the same, except that, in the inal trial, the intent of the defendant was more promin matter for consideration than here. And the parties wer this purpose, substantially the same. The defendant was *in propria persona*, and the plaintiff—the injured pa represented by his protector, the State. The auth seem to make the matter turn upon the opportunit cross-examination. This the defendant, against whor testimony is now offered, had fully, on the commitment See 1 Greenleaf Ev., sections 163 to 167. See, also, *U States vs. McComb*, 5 McLean, 286.

5. The verdict of the jury is not such as will justif Court in interfering with it, over the judgment of the cuit Judge, affirming it. The witnesses were seen and by the jury. Their character and antecedents appe their testimony. It was a case peculiarly within the ince of a jury, and we will not disturb it.

Judgment affirmed.

THE GEORGIA RAILROAD AND BANKING COMPANY, p tiff in error, *vs.* JOHN W. MCCURDY, defendant in er

1. When a railroad company, by its agents, takes the fair of a pas to a particular station on its road, it is bound to stop at that statio he may get off the cars; it is not sufficient that the speed of t is slackened. And if, after passing the station, the speed of the again slackened, that the passenger may get off, and, under the di of the conductor, he does get off, and, in so doing, gets injur company is liable. It is not want of ordinary care, if a passeng

dently uses the means which the company affords him to get off the train.

2. The jury are the proper judges of the *quantum* of damages in an action on the case against a railroad company for injuries received by passengers, and this Court will not overrule the Judge below, in refusing a new trial for excessive damage, unless the excess be manifest and gross.

Railroad Companies. Passengers. Damages. Tried before Judge HOPKINS. DeKalb Superior Court. September Term, 1871.

McCurdy paid his way to News Station, which was a wood and water station only, and the conductor agreed to put him off there. When they got there, the train was slackened; but McCurdy, being a heavy man, was afraid to get off. He went forward to see the conductor, who angrily blamed him for not getting off, and who again slackened up for him to get off; he did get off while the train was so slackened for him, and in so doing injured his ankle.

The Court told the jury that he could not recover, if the injury was caused by his own negligence; that if he and defendant were both negligent, and if he could not have avoided the injury caused by defendant's negligence, the plaintiff could recover; but the damages must be apportioned according to the fault of each. The jury found for him $500 and costs. Defendant's counsel moved for a new trial, upon the grounds that the verdict was contrary to said charge, etc. The refusal of a new trial is assigned as error.

HILL & CANDLER; HILLYER & BROTHER, for plaintiff in error.

L. J. WINN, for defendant.

McCAY, Judge.

1. The evidence is very plain that the railroad company, through its agent, the conductor, undertook to carry John W. McCurdy from Atlanta to the station referred to. This, as we think, bound them so to do. It makes no difference whether they were in the habit of doing this or not. By taking his

fare to that point, they undertook to carry him there a
him off. But on this point the evidence is rather in fa
the idea that it was the usual practice of the road t
passengers for that point. Why announce in the pul
rates the price from Atlanta to that point? But, as w
said, the Company undertook to carry him to that poi
to let him off there; surely the conductor is an agent a
ized to make such a contract, as it is directly in the l
his business. If he were to take a fare for four mi
would be bound to put his passenger off there, unless
was an agreement not to do so. It seems to us this
the question; for it will not, for a moment, be contend
if they undertook to carry the passenger to a particula
and put him off, they could fulfill this undertaking by
ening the speed at that point so that the passenger m
running the risk of his life—jump off from the n
train. But they did not even do this; they passed o
notified, when the conductor ordered the train to be
slackened.

Who that has seen much railroad traveling can fail
in his mind the picture of this scene? The conducto
pet, his train bound to take up its speed at an unusual
the passenger conscious that he was giving unusual t
the train slacks its speed; he stands ready, the con
ready also, to give the word—now jump. None but a
and yet resolute man would fail, and jump he did. V
clear this was not complying with the contract. N
this road defend itself on the idea that it acted so badl
with ordinary prudence the man ought to have seen
dangerous to jump. The railroad was bound to put h
to stop its train for this purpose. This it failed to d
it was not want of ordinary care in the passenger to u
only means to get off the course of the defendant per

2. We think the verdict of the jury *sustained* by tl
dence as to the amount of the damages.

Judgment affirmed.

JOHN D. COLLINS, plaintiff in error, *vs.* E. M. RICHARDSON *et al.*, defendants in error.

1. It is unnecessary to file the affidavit of taxes paid, as required by the Act of October 15, 1870, in an action for false representations of the solvency of one whom the plaintiff was thereby induced to credit, and in consequence of which it was alleged the plaintiff had lost this debt.
2. If a case be called and dismissed for want of prosecution, and before the next case is called, counsel for plaintiff in error appear and ask that the case be heard, and the order of dismissal be not taken, the case will be heard. (R. See end of Report.)

Relief Act of 1870. Tax. Practice. Supreme Court. Before Judge HARVEY. Polk Superior Court. August Term, 1871.

Collins averred that in February, 1865, he was engaged as a teacher in Woodland Female College, at Cedartown, Georgia, and hearing some complaint about the pecuniary condition of the college, called on Richardson *et al.*, trustees of the college for an exhibit of the financial condition of the college, which they refused to make, but wrote him not to fear, that the assets of the college were ample to meet its liabilities, and he, relying upon this, taught one year, and could not get pay because the college was insolvent. Averring that their representations were fraudulently made, he prayed a judgment against them for his said services. Because he filed no affidavit as to the payment of taxes, the Court dismissed the case. That is assigned as error.

(When the case was called, it was dismissed for want of prosecution, but before the order was taken or another case was called, counsel for plaintiff in error came in and asked that the case be heard, and it was allowed.)

E. N. BROYLES, for plaintiff in error.

J. F. THOMPSON, by J. W. H. UNDERWOOD, for defendants.

McCAY, Judge.

As against this defendant, this cause of action was not taxable property. It was a *tort*. It had no fixed value. It was not a contract. The very point of it is the *wrong*, the deceit. The debt as against the corporation is not in suit in this action. The plaintiff may or may not have given in and paid the taxes on that. *This* cause of action is the deceit, the fraud practiced, as is alleged, on the plaintiff. We do not think any man ever has thought such causes of action not based, even on contract, but standing as much on *tort*, as slander, are taxable.

Judgment reversed.

THOMAS BLACKMAN, plaintiff in error, *vs.* E. W. CLEMENTS, deputy sheriff, defendant in error.

That a third person, not the defendant, has taken a homestead on land, against which a mortgage *fi. fa.* has issued, will not excuse the sheriff for failing to sell, when such *fi. fa.* is placed in his hands for levy and sale; and where he sets up such fact as his only excuse, in answer to a rule to shew cause why he should not be compelled to pay the amount of the *fi. fa.* to the plaintiff, a rule absolute will be granted against him for the value of the land, if such value be less than the amount of the *fi. fa.*, otherwise for the amount of the execution.

Rule against sheriff. Measure of damages. Before Judge HARVEY. Polk Superior Court. August Term, 1871.

The opinion gives the necessary facts.

ALEXANDER & WRIGHT, for plaintiff in error.

BLANCE, DODD & KING, by J. W. H. UNDERWOOD, for defendant.

MONTGOMERY, Judge.

This was a rule against the sheriff for not selling a tract of land levied on under a foreclosure of a mortgage for the

purchase-money. The sheriff's excuse was that the mortgagor had sold to a third person, and that such third person claimed a homestead, and that he did not know the mortgage was for purchase-money.

The Court refused to make the rule absolute, but ordered the sheriff to proceed with the sale. We think the rule absolute should have been granted for the value of the land or the amount of the execution, whichever was the less amount, under the decision of this Court, in *Baker vs. Brown, sheriff*, decided September 12th, 1871. Judgment reversed.

COHEN & HARGROVE, plaintiffs in error, *vs.* THE ROME RAILROAD COMPANY, defendant in error.

The verdict in this case is not only not contrary to the testimony, but is the only verdict which, under the evidence, the jury ought to have found.

New trial. Tried before Judge PARROTT. Floyd Superior Court. July Term, 1871.

Cohen & Hargrove sued the Rome Railroad Company for the non-delivery of certain goods which they averred were shipped to them from New York to Rome, over said railroad. They failed to prove that said goods were ever in possession of defendant, and the jury found for defendant. A motion for new trial upon the ground that the verdict was wrong was overruled.

UNDERWOOD & ROWELL; C. D. FORSYTH, for plaintiffs in error.

PRINTUP & FOUCHE, for defendant.

McCAY, Judge.

Whatever may be the law of the case, as argued at the hearing, on the liability of this road under the circumstances, if it were proven the lost goods had ever been in its posses-

sion, it is very clear from this record that the verdict of *the* jury is right. There is no proof that the Rome Railroad ever had or undertook to carry the goods sued for. Indeed, the proof is very strong, that the goods never came upon that road. It was the clear duty of the plaintiff to show this, and the judgment must therefore be affirmed.

Judgment affirmed.

HOLLINGSWORTH & MORAQUE, plaintiffs in error, *vs.* THE GERMANIA, NIAGARA, HANOVER & REPUBLIC FIRE INSURANCE COMPANIES, defendants in error.

1. An Insurance company which reserves to itself the right to cancel its policies upon return of the unearned premium, must pay or tender such premium to the assured before it can relieve itself of liability on the policy. Notice of its intention to cancel, with mere announcement of its readiness to pay, is insufficient.
2. Surrender of the policy for cancellation prior to the loss, and subsequent payment of the unearned premium to the assured, and acceptance by him, after destruction of the property insured, both parties being ignorant of the loss, will not release the company from liability.

Insurance. Tried before Judge PARROTT. Floyd Superior Court. July Term, 1871.

The facts are in the opinion. Judge Parrott charged that the notification by the agent of the insurers to the agent of the assured that he was ready to refund the unearned premium, canceled the policy without an actual payment of the same to him. There was a verdict for the defendant, and a new trial was refused.

PRINTUP & FOUCHE; UNDERWOOD & ROWELL, for plaintiffs in error. The policy was not canceled: 2 Cr. Sc. R., 127; Ang. on Ins., sec. 1991; Phil. on Ins., 2577; 47 Ill. R., 516; 55 Barb. N. Y. R., Hawthorn *vs.* Ger. Ins. Co.

SMITH & BRANHAM, for defendant.

MONTGOMERY, Judge.

The policy sued on in this case contained the following provision: "This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be at any time terminated at the option of the companies, on giving notice to that effect, and *refunding a ratable proportion of the premium for the unexpired term of the policy.*"

The insurance was effected in Rome, Georgia, on goods in Gadsden, Alabama. The companies elected to cancel the policy unless the assured would pay an additional premium, which they declined to do. The companies' agent notified the assured to forward their policy to Rome, for cancellation, and he would refund the unearned premium. The policy was forwarded from Gadsden, on January 15th, 1868, and received by the agent on the 17th or 18th of the same month, with instructions to pay the unearned premium to the plaintiffs' agents in Rome. He notified the plaintiffs' agents that he was ready to pay them, but did not in fact pay them until February 27th, more than a month after the receipt of the policy by him. The goods were burned on the night of February 25th. On the morning of the 28th of February, before it was known in Rome that the loss had occurred, the agent of the companies met one of the plaintiffs in Rome, and notified him of the payment to his agents, with which he expressed himself satisfied. A few hours afterwards the news of the loss reached Rome, and the plaintiffs refused to receive the money from their agents, and brought the present suit.

1. Do the facts exonerate the companies? We think not. Their contract was that they might cancel "on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy." They gave the notice, but they did not refund until the loss had occur-

red. On the contrary, they failed to comply with the conditions of their contract for more than a month after the plaintiffs had done all that was required of them. It is not pretended that they tendered the money, and that plaintiff's agents refused to receive it: The Peoria Marine and Fire Insurance Company *vs.* Botts, 47 Illinois Reports, 516; Hawthorn *vs.* Germania Insurance Company, 55; Barbour's New York Reports cited in 9 Volume American Law Register, page 385.

But it is insisted, for the companies, that the policy expired when it was surrendered for cancellation; and the case of *Sullivan vs. Massachusetts Mutual Fire Insurance Company*, 2 Massachusetts Reports, 318, is relied on as sustaining this view. There the property was alienated some time before the surrender; and the liability of the company as insurer ceased on alienation. Their charter bound them to refund unearned premiums, on surrender of the policy; which they refused to do, because it had not been surrendered within one year from the termination of their liability as insurers by the alienation, in which time, they insisted, the charter required the surrender to be made. The Court, however, held that the surrender was in time to make them liable. There was no question as to when their liability as *insurers* ceased; that had ceased long before the surrender of the policy, by the alienation, though they were still bound by the terms of their charter to pay on the policy whatever of unearned premium they held, or, rather, whatever proportion of the funds the assured was entitled to, at the time of the surrender, the company being organized on the mutual plan, and each insurer being a stockholder, entitled, "at the expiration of his policy," to demand and receive from the corporation his share of the remaining funds, in proportion to the sum or sums actually paid by him. Again, it is said, Code, section 2686, controls the case. Hardly. Plaintiffs, by letter, agreed to the proposal of the companies to cancel, upon the companies complying with the objections imposed upon them by

the contract, should they elect to cancel. They failed to do this; hence, no cancellation. Defendants also rely on *Taylor vs. The Merchants' Fire Insurance Company of Baltimore*, 9 Howard, Supreme Court Reports, 398. That case only goes to the extent that an offer made by mail and accepted cannot be revoked. So here, had the agent of the companies, before the loss occurred, paid the unearned premium to the agents of plaintiffs as the policy of insurance required him to do, if he wished to cancel, the plaintiffs could not have insisted on retaining the policy in force. The case in 9 Howard, however, refers to and approves *Eliason vs. Henshaw*, 4 Wheaton, 228, in which the Court say: "An offer of a bargain by one person to another imposes no obligation upon the former, unless it is accepted by the latter, according to the terms on which the offer was made. Any qualification of or departure from those terms invalidates the offer, unless the same be agreed to by the party who made it." The terms here were that the companies should pay the unearned premium to plaintiff's agent. These terms they departed from; hence, the offer was invalidated.

It is also argued with some ingenuity that, inasmuch as the law is, in cases of insurance, "if the loss has already occurred, and both parties are ignorant of it, the contract is valid," (Code, section 2758), therefore, the converse of the proposition must be true; and if a rescission of the contract is made in ignorance of the loss, it is equally as binding. The reply is, that insurance is often effected because loss has already probably occurred, though both parties are ignorant of it. This is not uncommon, in cases of vessels at sea; and the risk of a loss which may have already happened is provided for by the amount of premium charged, reaching sometimes as high as fifty or even seventy-five per cent. of the full value of the property insured. In case of cancellation, the manifest intention of the parties is to discharge the insurer from all *future* liability, and not to relieve him from any liability incurred under the contract. To illustrate: suppose

the goods in this case had been partially destroyed before cancellation of the policy, the cancellation would not relieve the companies from liability for that loss; but, for a total destruction afterwards, they would not be liable.

Judgment reversed.

R. J. G. BLAKE, plaintiff in error, *vs.* J. B. CAMP, defendant in error.

Where an attachment was sued out, returnable by law, to 1120th District, Georgia Militia and the bond, so recited, but the magistrate, by mistake, made the attachment returnable to the 919th District, Georgia Militia.

Held, That if the levying officer, in fact, returned the papers to the proper district, to-wit: the 1120th, and judgment was then entered up on the attachment, the judgment was not void, and an affidavit of illegality, setting up these facts, was properly overruled.

Attachment. Amendments. Tried before Judge HARVEY. Floyd Superior Court. July Term, 1871.

The facts are in the opinion.

WRIGHT & ALEXANDER, for plaintiff in error.

W. B. TERHUNE, by WRIGHT & FEATHERSTON, for defendant.

McCAY, Judge.

The attachment was returned by the officer to the 1120th district, which was the proper district, according to the last residence of the defendant, and the trial was had and judgment obtained before the magistrate of that district. By a mere slip of the pen, the magistrate who issued the attachment had made it returnable to his own district. He used his printed forms, and made it returnable to the Justices'

Court of said district, which, as a matter of course, must be taken literally to be the district mentioned on the margin, to-wit: 919th district. But the bond recites the proper district; the officer who served the attachment returned the affidavit, bond and attachment to the proper district, and it was then tried and judgment given. The Court giving the judgment had jurisdiction of the case under the law. The only trouble is that the direction to the officer in the attachment process was, by a clerical error, wrong.

We do not think this mistake makes the proceedings void. It is not the written direction to the sheriff or constable which gives the Court jurisdiction, but the law. If the officer had obeyed the direction and returned the papers as directed, the Court to which it would then have been returned, would not have had jurisdiction, and the judgment would have been void. As it is, the Court which tried the case was authorized to do so by the statute. Our statute of amendments is very broad. No technical objections even to a process are to be regarded, if the Court has jurisdiction: Section 3269 of the Code. Process is amendable: Code, section 194. The attachment and bond are amendable: Code, section 3240. The omission to give the Court jurisdiction in the pleadings is amendable: Code, section 3438. And it is laid down as a general rule, by McNamara on Irregularities, that nothing will make a judgment void that is amendable.

We therefore affirm the judgment in this case. We may add, that at the last term of this Court, in a case from the Chattahoochee circuit, we held an attachment returnable on its face to the November Term of a Court, when it should have been made returnable to the May Term previously, was amendable if it was in fact returned by the officer to the May Term.

Judgment affirmed.

LOYD BEALL, plaintiff in error, *vs.* WILLIAM BAILEY, defendant in error.

When an affidavit of illegallity, with the usual bond, is delivered to the sheriff, it is returnable to the next regular term of the Court from which the execution issued, and not to an adjourned session of the same term. If the sheriff makes his return to such adjourned session, and the Clerk enter the case on the docket, it is error in the Court to call the case up, and dismiss it at that term.

Illegality. Practice. Before Judge HARVEY. Floyd Superior Court. June Adjourned Term, 1871.

Bailey's *fi. fa.* against Beall, ordered the sheriff to make the money, and return the writ to January Term, 1871, of said Court. It was levied in February, 1871. In March, 1871, Beall lodged with the sheriff an oath of illegality to stop the sale. The sheriff returned the papers to the Clerk's office, and he entered the illegality upon the docket. January Term was adjourned till June, 1871, and then this case was called. Beall's counsel objected that it was properly returnable to July Term, 1871, and could not yet be called. The Court overruled the objection and heard and dismissed the illegality. That is assigned as error.

ALEXANDER & WRIGHT, for plaintiff in error.

UNDERWOOD & ROWELL, for defendant

McCAY, Judge.

The Revised Code, section 3613, is positive and precise that the officer shall return the affidavit and bond to the *next term* of the Court from which the execution issued, and it shall be the duty of the Court, at the *first term thereof*, to determine the same. The plaintiff in this case is well satisfied that the affidavit is very lame and was only interposed for delay. Suppose it is. That does not make it returnable to a different term. It is important that the rule be kept uni-

form. The return of the papers is the only notice either gets of the pendancy of the illegality, and it is important, both to the plaintiff and defendant, that each party shall know when the case is to be heard. The case of *Brown & Wright vs. Smith & Leonard*, 24 Georgia Reports, 418, is precisely in point. There the *certiorari* was frivolous. But this Court overruled the Judge in taking it up at a term too soon. The statute is positive and must be obeyed. Judgment reversed.

MARY A. BURGE *et al.*, plaintiffs in error, *vs.* WILLIAM T. BURGE, administrator, defendant in error.

1. Equity will reform a marriage contract, after the death of the husband, at the instance of his child by a former marriage, if it is made plainly to appear that at the time of the second marriage, it was agreed between the parties that the property of each should be settled on its owner for life, with remainder to the children of such owner by a former marriage, but the draftsman of the contract omitted to insert the provision as to the husband's property, and both parties signed under the impression that it was inserted.
2. Ignorance of the omission on the part of the husband, with knowledge of it on the part of the wife, and concealment of it by her from him at the time of signing the contract, would be a fraud upon him, and on this ground equity would reform the contract.
3. If the husband is informed, after the marriage, of the omission, and says he will rectify it by his will, but fails to do so, though he lives for twenty months thereafter, he cannot be said to have acquiesced in the instrument as written, so as to prevent equity from reforming it, especially where there is no evidence of acquiescence on the part of the remainder man, who was a minor at the death of the husband.
4. It is not error in the Court to say to the jury that in common parlance the word "heirs" means children, where he gives the legal meaning at the same time.
5. The verdict is sufficiently sustained by the evidence and not contrary to law.

Reformation of Contracts. Before E. N. BROYLES Esq., Judge *pro hac vice*. Polk Superior Court. February Term, 1871.

The facts are sufficiently stated in the opinion.

UNDERWOOD & ROWELL; C. D. FORSYTH; R. FOUCHE, for plaintiffs in error.

WARREN AKIN, for defendant.

MONTGOMERY, Judge.

This was a bill filed by the defendant in error, as the administrator of Dalton Burge, against the plaintiff in error, as the widow of the intestate, and John W. McGhee and his wife, Susan Z. McGhee, the son-in-law and daughter of the intestate, the daughter being also the only child by a former marriage. The widow had also been twice married, and had children by her first marriage. There was no child by the marriage of intestate with his last wife.

The subject matter of controversy was the property of intestate, his widow claiming one-half as an heir-at-law, his daughter and her husband claiming the whole under a marriage settlement, entered into between the intestate and his surviving wife, at the time of their marriage; the daughter and her husband alleging that, at the time of said marriage, it was agreed between Dalton Burge, the intestate, and Mrs. Mary H. Lattimer, his intended wife, that the property of each should be secured to the children of each by their former marriages, on the death of the owner; that the settlement was drawn up, and did so secure Mrs. Lattimer's (afterwards Mrs. Burge) property, but, through fraud or mistake, failed to secure Dalton Burge's property as intended. The widow insisted that the contract was drawn as intended. The contract was drawn by Abner Darden, two of whose children had married two of the widow's children by her first marriage. Darden swore positively that the marriage contract, as drawn, was in exact compliance with the instructions received from the parties. The widow swore equally positively that the contract was in accordance with

he intention of the parties; that there was no omission, and hat Burge frequently expressed himself satisfied with it, fter their marriage; that she never had said anything to ny one, going to show that Burge and herself had intended o make a contract, and did make it, as claimed by Burge's laughter.

On the other hand, there are no less than eight witnesses, o-wit: Treadway, Simeon Hamil (the Justice of the Peace who witnessed the contract), Mrs. McGhee, P. H. Michael, Matilda Haney (who negotiated the terms of the settlement with Mrs. Lattimer, at the instance of Dalton Burge), James Sanders, J. D. Thompson and Radford Ellis, whose testimony, taken together, show overwhelmingly that the parties did intend to make the contract, as alleged, and many of whom flatly contradict the widow's statements, as to her own sayings about the matter. She is also contradicted, on another points, by a Mrs. Lyon, another witness, the widow testifying that she did not know Mrs. Lyon, and had had no conversations with her about her marriage settlement; Mrs. Lyon swearing positively to certain conversations between herself and the widow about the marriage settlement.

The evidence shows that either both parties signed under the supposition that the contract was drawn as had been agreed upon, or that Mrs. Lattimer knew of the omission, and concealed it from Burge. She testifies that she knew the contents of the marriage contract, at the time of the marriage, and knew them by reading it. The Justice of the Peace who witnessed the contract testifies that Burge called for him to go to Mrs. Latimer's house with him, and witness the contract, and that, on the way there, Burge said the contract was, as now alleged by his daughter it should have been drawn; that they found Judge Darden at Mrs. Lattimer's, and that "Judge Darden then produced an instrument of writing, saying that it was a marriage contract between Dalton Burge and Mrs. Lattimer, and laid it on a bureau, and Dalton Burge and Mrs. Lattimer signed it, and

then I signed it, as a Justice of the Peace. I did not Mrs. Lattimer say one word, in regard to the contrac *did not hear the contract read;* and knew nothing contents, except what Dalton Burge told me on the v Mrs. Lattimer's." He says nothing of its being hanc Dalton Burge to read—indeed, its contents were so v from what Burge had just told the witness, that it may be presumed from that (and the testimony of the witn to the manner in which it was signed) that Burge v without reading the contract. If Mrs. Latimer read she says she did, it was probably before the arrival of and the witness; and her knowledge of the variance the agreement, and the concealment of it from Burge, fraud upon him if the agreement was as alleged. A jury have so found, this Court must assume, under th dence that sustains the finding, that the finding is corr

Some of the witnesses testify that Mrs. Burge told that her husband had supposed, up to about twenty n before his death, that the contract was drawn in acco with their agreement; at which time she informed h his mistake, and he said he would rectify it by mal will. Counsel insist that, as he failed to make a will was an acquiescence in the contract as it stood, even si ing it did not express the original intention of the p There was no acquiescence on the part of Burge's dau the party chiefly interested, who was a minor at the de her father.

The Court, in its charge, told the jury that, in co parlance, the word "heirs" meant children, but, at th time, gave them the legal definition of the word. This is alleged as error. The assignments of error conta usual allegations that the verdict is contrary to law an dence.

Judgment affirmed.

BENJAMIN E. GREEN, plaintiff in error, *vs.* SOUTHERN EXPRESS COMPANY, defendant in error.

1. In a suit against a common-carrier for the loss of a trunk, there being evidence going to show that the shipper placed a value upon the trunk, at the time of shipment, much less than the amount of the verdict in favor of the plaintiff, a new trial will not be granted at his instance, especially where, on looking to the whole record the verdict is not so decidedly against the weight of evidence as to warrant the Court in setting it aside.
2. If a shipper decline to state the value of goods when asked by the carrier, it is questionable whether he can recover of the carrier. (R.)

Common-carriers. Before Judge PARROTT. Whitfield Superior Court. June, 1871.

Benjamin E. Green; "for the use of himself and the Dalton City Company, a corporation, and for the use of Duff Green," sued said company, as a common-carrier, for the loss of a trunk and its contents, to-wit: "many articles of great value, consisting of title papers to valuable tracts of land, promissory notes, and many other valuable papers; and also goods, wares and merchandize of great value, to-wit; of the value of $20,000." No bill of particulars was attached to the petition.

The defendant pleaded the general issue; that plaintiff valued his trunk at $100 when delivered for shipment, and that they had tendered him $100 and interest since the date of the receipt. This tendered sum was deposited in Court.

The main body of the evidence is in the opinion. Green testified that before sending the trunk to the Express office in Montgomery, Alabama, he went to the office and told one, whom he supposed to be agent, that he had a very valuable trunk to be shipped to Dalton, but was short of funds, and could not ship it unless he would charge for it by weight only, and that he agreed to do so. That, about two hours later he took the trunk there, and that person was gone; but, without mentioning the contract, he delivered the

trunk to another agent, who took it, weighed it and handed him the exhibited receipt. In that receipt the value was put at $100, but plaintiff says he did not give any value, nor knew it was put in the receipt, till the trunk was lost.

The person who received the trunk and gave the receipt, swore that he did not put in the $100 at his own instance, but, while he did not remember the case, knew, from the rules and uniform custom of defendant, that he asked the value, and would not have inserted $100 had not plaintiff given that as the value. He explained the company's arrangement for taking care of very valuable freights, and gave an account of a smash up, etc., in which part of the less valuable freight was lost *en route* from Montgomery, and he supposed said trunk was of that lot. He said, had he known it was very valuable he would have saved it, as he did his other very valuable freight. What became of the trunk he did not know.

The Court charged the jury that the first verbal arrangement as to shipping, under the facts stated, was merged in the contract made by accepting the receipt.

The jury found for plaintiff $250 and costs. Plaintiff's counsel moved for a new trial upon the grounds that said charge was wrong and said verdict wrong. A new trial was refused, and that is assigned as error.

D. A. WALKER, by W. H. DABNEY, for plaintiff in error.

McCUTCHEN & SHUMATE, for defendant.

MONTGOMERY, Judge.

1. It appears, by the receipt of the defendants in this case, produced by the plaintiff on the trial, that the latter shipped, at Montgomery, Alabama, a trunk, to be transported to Dalton, Georgia, by the defendants as common-carriers. The receipt bears date November 20, 1865, and states the value of the trunk and contents at $100. The evidence

shows that the trunk was packed in July, 1863, with title-deeds and other papers and jewelry. The trunk was carried by a third party, after being packed, first to Pendleton, South Carolina, and then to Montgomery, Alabama. It remained in the latter place some eighteen months, before it was shipped by the plaintiff. It is true that the plaintiff testifies to very heavy damages, both direct and consequential. It is to be observed, however, that there is a great want of definiteness upon this point, and, in some cases, a want of knowledge of the value of the articles lost. He estimates the loss of jewelry at $500, without being able to name any article lost but two gold pencils, one of which he values at $100, without being able to say "whether they were pure gold or alloy." Conceding it to have been pure gold, it must have been a most extraordinary pencil, both in size and weight, to have been worth that sum, or anything like it. And yet the witness says "it was a common-sized pencil." Again, he says the loss to the Dalton City Company, of which he was the agent, by loss of deeds (all of which, he says, were recorded), and a memorandum-book, containing the names of parties to whom the company had sold lands, was $2,000; that he had replaced this memorandum-book, and that the labor was worth $2,000. How he replaced the book the witness does not say; it is to be presumed that the records of Whitfield county furnished him with data sufficient for this purpose. The jury might well have supposed $2,000 a very extravagant charge for such work, with data so complete. If the records of Whitfield county were destroyed, it does not so appear. Whether the book, when made, is worth $2,000, or is of any money value, the witness is silent. The only other item of loss relied on by the witness is that of certain receipts, which were in the trunk, and, by loss of which, he was compelled to pay $6,950 60 a second time to one Alexander, who sued him. His testimony, on the cross-examination as to this, is as follows: Witness' father paid the money to Alexander, for which said

lost receipts were given; witness was not present when the money was paid, and does not know, of his own knowledge, that it was paid. Witness and witness' father both testified as witnesses on the trial of the suit with Columbus Alexander. Witness could not then, nor can he now, remember the dates or amounts paid by him, nor the dates of the receipts. "The amount mentioned on the direct examination, $6,950 60, is the difference between the amount of the receipts and the amount that the father of witness could recollect having paid to Alexander." This testimony, as it stands, is vague and uncertain enough to have had very little weight with the jury, especially when taken in connection with the preceding testimony of the witness. How the witness arrived at the exact difference between the amount of the receipts and the amount that his father recollected to have paid Alexander is not very apparent, when he has no recollection of the dates or amounts of the receipts. If he had data by which he arrived at this result, he should have stated them. Nor does he account for the failure to have his father's testimony, who certainly was a very important witness as to this Alexander transaction, conceding that the Express Company could be held responsible for damages so remote. It does not appear that, after the plaintiff packed the trunk in July, 1863, he ever re-opened it and examined its contents, before shipping it on November 20, 1865, although it had, in the meantime, been in the custody of three other persons, and been carried, first to South Carolina, and then to Alabama, in which latter State it had remained stored away some eighteen months. The foregoing states all the salient points in the testimony in favor of the plaintiff. Taking it alone, and assuming that the Express Company are responsible for the full value of the loss *proved*, I do not think we could disturb the verdict.

2. But the plaintiff himself testifies that he was asked, at the time of shipping the trunk, to state its value, which he failed to do. The evidence on the part of the defense

was distinct that he did value it at $100. The jury were the judges of this conflict. If the law of Georgia is to govern, it is very questionable whether his failure to place a value upon the trunk, when requested to do so, did not deprive him of all right of recovery under Revised Code, section 2054, and the decision of this Court, in *Southern Express Company vs. Everett*, 37 Georgia Reports, 688, and *Southern Express Company vs. Newby*, 36 Georgia Reports, 645. For though the company might have agreed to carry the trunk as freight, still they were entitled to know its value, in order to know what degree of care was necessary to its safety. If the contents were as valuable as plaintiff claims, it was a fraud upon them to conceal that value, the more especially as property to that amount is not usually contained in such a receptacle. If the law of Alabama is to control the case, the plaintiff must fail on another principle: *Steel & Burgess vs. Townsend*, 37 Ala., 247. In the view which we have taken of the case, it is wholly immaterial whether the agreement was to ship and *charge* by value or by weight. It is not pretended that there was any agreement that, in case of loss, the company should be liable for more than the value placed upon the trunk by the shipper. If he placed no value upon it, when asked, it would certainly be inequitable to hold them liable for more than the usual value of a trunk and contents. When goods of an extraordinary value are so shipped (as is claimed to be the case here), and the value is withheld from the carrier, although he asked for it, it operates as a fraud upon him, and relieves the carrier from liability: "Story on Bailment, section 565–567. Looking to all the facts of the case, and the law as applicable to those facts, we are satisfied that we are not warranted in interfering with the verdict.

Judgment affirmed.

S. B. SLOAN, guardian, plaintiff in error, *vs.* LARKIN NA *et al.*, defendants in error.

1. Where a will directs realty to be sold, and bequeaths the proce minors, and the executor, who is also testamentary guardian o minors, has such realty set apart as a homestead for his wards, h not afterwards sell the homestead at private sale, even with the co of the Ordinary, although the will gives him the power so to se land. When the land was set apart as a homestead, the title was v in the minors.
2. The objection to the admission of the judgment against the exe as such, in evidence was well taken, as it was entirely irrelevant t issue.
3. Minors, who have a guardian, may sue by next friend, when the terest is adverse to that of the guardian, under Revised Code, s 1812.

Homestead. Minors. Before Judge HARVEY. W field Superior Court. October Term, 1871.

Sloan was executor of A. Sloan and guardian of his dren. The will directed him to sell testator's land, pub or privately, and divide proceeds between testator's chil Sloan had the land set apart as a homestead for the n children, and then, with the approval of the Ordinary, the land. The minors, by their next friend and guar brought ejectment for the land. They contended that the if legal, was fraudulent, and one evidence of fraud was inadequacy of price. To meet that defendants showed, plaintiff's objection, that there were judgments agains executor, as such, which endangered the title. The C charged the jury that the sale, under said approval o Ordinary, was good, if not fraudulent. The jury foun defendants. Said rulings are assigned as error.

McCUTCHEN & SHUMATE, for plaintiff in error.

W. K. MOORE, for defendant.

ONTGOMERY, Judge.

rchibald Sloan died leaving a will, by which he directed executor to sell the land in dispute, at private or public and divide the proceeds among testator's children, the es of plaintiff. The executor, who was also testamen- guardian, instead of selling the land, had it set apart as mestead to the children, believing the estate to be insol- . Afterwards he obtained from the Ordinary the follow- aper:

ATE OF GEORGIA—WHITFIELD COUNTY:

W. H. Brooker, Ordinary for said county, do hereby ap- e the transfer of said lot of land, number two hundred forty, in the thirteenth district and third section, set apart omestead for A. Sloans' minor children, when their guar- , Samuel B. Sloan, can transfer it with propriety, and to benefit of said minors.

/itness my hand and official signature, this April 14th,). W. H. BROOKER, *Ordinary.*"

n the same day the guardian sold the land at private sale efendants, and in two weeks afterwards removed from the e. The suit is brought by the minors, through W. C. tin, as next friend.

1 the course of the trial the defendants were permitted, the objection of plaintiff's counsel, to prove the existence idgments against the executor, as such, which it was ned rested as a cloud over the title to the land, and the of which defendants took when they bought. It was objected by defendants that the minors, having a guar- , who had not been removed, could not sue by next friend. e questions arise here: 1st. Was the sale of the home- l valid? 2d. Was the objection to the admission of the ments against the executor good? 3d. Had the minors ight to sue by next friend?

1. There is no provision made by the homestead laws for the sale of a minor's homestead. If it can be sold at all, it can only be sold as provided by the Code for the sale of other realty belonging to the minors. It is very doubtful whether such an assent by the Ordinary to the sale of any homestead would be valid. The executor could not sell as such. The setting apart of the land as a homestead divested the estate of the title, and conferred it upon the minors. Hence, the deed of the defendants is worth nothing as against their rights.

2. The judgments against the executor were entirely irrelevant to the issue, and should have been rejected.

3. Revised Code, section 1812, provides for suits by minors through a next friend where their interest is adverse to that of their guardian, as it certainly is here. He is at least responsible to defendants in an action for money had and received, for the amount paid by them for the land.

Judgment reversed.

UNDERWRITERS' INSURANCE AGENCY, plaintiffs in error, *vs.* WILLIAM T. SOUTHERLIN, defendant in error.

Practice Supreme Court. From Dougherty county.

The following order in said cause explains itself:

"It appearing to the Court that the bill of exceptions in said case purports to be an established copy of the lost original, and it also appearing from the record that a motion is still pending in Dougherty Supreme Court, to establish said lost original, it is ordered that said case be continued, and that counsel have leave to withdraw from the files of this Court the said purported established original, for use in the motion pending in the Court below," 14th February, 1872.

VASON & DAVIS, by R. H. CLARK, for plaintiff in error.

WILLIAM E. SMITH, for defendant.

GEORGE HENDERSON, plaintiff in error, *vs.* LOUISA GREER *et al.*, defendants in error.

Practice Supreme Court. Equity from Terrell county.

Greer, one of the defendants in error, died after the bill of exceptions was sued out. His estate was unrepresented when the cause was called here, on the 8th of August, 1871. The Court granted an order that plaintiff in error, at the next term, might open the record and proceed to a trial, and ordered that said order be published sixty days before said next term. On July 26th, 1872, it was dismissed, and the judgment affirmed, because plaintiff in error had taken "no legal steps" to have Greer's representative made a party defendant *ad interim*. He had failed to have said order of 1871 published, as required. 21st February, 1872.

WRIGHT & WARREN; C. B. WOOTEN; W. A. HAWKINS, for plaintiff in error.

H. MORGAN; A. HOOD, for defendant.

E. H. WORRELL, plaintiff in error, *vs.* H. & C. ADAMS, administrators, *et al.*, defendants in error.

Practice Supreme Court. Suit on administrator's bond. From Stewart.

This case was tried below upon issuable pleas filed by the securities upon the administrator's bond. The principal filed no plea. The jury found for the securities, but made no finding as to the principal. The plaintiff brought the cause here, averring errors, etc.

Here, upon consent of counsel, this Court ordered that the judgment below should be affirmed, "provided nothing

in this order shall be so construed as to preclude the plaintiff from proceeding against said principal in the Court below." 24th February, 1872.

E. J. RAIFORD; B. WORRELL; J. L. WIMBERLY, for plaintiff in error.

M. J. CRAWFORD; BEALL & TUCKER, for defendants.

J. M. NUNEZ & COMPANY, plaintiffs in error, *vs.* THE SOUTHERN EXPRESS COMPANY, defendant in error.

(BY TWO JUDGES.)—Where a new trial is granted, and the judgment of the Court granting a new trial is excepted to, the plaintiffs in error cannot assign error upon the charge of the Judge to the jury.

Where the Judge of the Court trying the cause granted a new trial on the ground that the verdict is contrary to the evidence, his discretion will not be controlled, unless it is manifest it has been abused. March 6th, 1872.

New trial. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1871.

The necessary facts are in the opinion.

M. H. BLANFORD, R. J. MOSES, for plaintiffs in error.

SMITH & ALEXANDER, for defendants.

MONTGOMERY, Judge.

This was a suit against the defendant in error for a failure to transport fruit from Columbus to New York within the time required by special contract, by which failure plaintiffs allege loss by reason of the fruit rotting and by non-delivery of seven boxes of the fruit.

The contract proven differed in some essential particular from that set out in the declaration. The Court charged th

jury, that "the plaintiff declares on a special contract, and unless the contract is proven, as set out in the declaration, the plaintiff cannot recover."

The jury found for plaintiff, and defendant moved for a new trial; first, because the verdict was contrary to law and the charge of the Court; secondly, because the verdict was contrary to evidence. The Judge granted a new trial, and plaintiff excepted to the order granting a new trial, and to the charge of the Court to the jury.

Of course, if a new trial is granted because the verdict is contrary to the charge of the Court, and the verdict is right and the charge wrong, the judgment granting the new trial will be reversed. But if the new trial be granted because the verdict is contrary to evidence, the plaintiff cannot complain of the charge to the jury, for two reasons; first, he was not hurt by it; secondly, it is no final decision from which a writ of error lies. If the judgment granting the new trial, on the ground that the verdict is against evidence, is correct, it is not even a decision to which the plaintiff is obliged to file a bill of exceptions *pendente lite*. The granting of the new trial necessarily re-opens the whole case. If the judgment granting the new trial, on the ground that the verdict is against the evidence, is incorrect, a reversal for this reason will answer every purpose of plaintiff in error.

Taking into view the evidence, and the charge of the Court, it is apparent the new trial is granted on the ground that the verdict was contrary to the evidence, though the Judge does not so say in the order granting the new trial. This Court has repeatedly decided that where a Judge grants a new trial on the ground that the verdict is contrary to the evidence, his discretion will not be interfered with unless manifestly abused. We see no abuse of it in the present case.

Judgment affirmed.

HANNAH COLEMAN, plaintiff in error, *vs.* W. A. RANSOM & COMPANY *et al.*, defendants in error.

Practice Supreme Court. Service of bill of exceptions. From Muscogee county. May Term, 1870.

There was no entry of service upon the bill of exceptions, and for want of service defendant moved to dismiss the cause. Plaintiff's counsel said, if time was given he could prove that a copy of the bill of exceptions was served upon the party or his counsel. The Court replied that time could not be given; that service must appear on the bill of exceptions, by an acknowledgement, or by a return of an officer or affidavit of the party perfecting it, and dismissed the cause.

C. J. THORNTON; FARROW & THOMAS; G. E. THOMAS, for plaintiff in error.

CHAPPELL & RUSSELL, for defendant.

W. A. RANSOM & COMPANY, plaintiffs in error, *vs.* HANNAH COLEMAN, defendant in error.

Practice in Supreme Court. From Muscogee. May Term, 1870.

When this cause was called here, counsel for plaintiff in error moved to withdraw the record. Defendant's counsel objected, insisting that the cause should be argued and decided. As it was not to reverse a judgment for money, the Court held that it could be withdrawn, and that if it were a money judgment, plaintiff could not withdraw without defendant's consent, as she would then have a right to have the cause heard and ask for damages for delay.

CHAPPELL & RUSSELL, for plaintiff in error.

FARROW & THOMAS; G. E. THOMAS; THORNTON & SPENCER, for defendant.

Isaac Coleman *vs.* Hon. James H. Johnson.

1. If the evidence is material to an understanding of the errors complained of, the Judge should not certify a bill of exceptions which contains no version of the evidence. (R.)
2. If the Judge refuses to certify a bill of exceptions, he should *then* be asked to endorse upon it his reasons for refusal, and if he will not, the matter should be *then* brought to the notice of this Court. The complaint cannot be made after thirty days from said refusal have elapsed. (R.)

Mandamus. Bill of exceptions. Muscogee county. May Term, 1870.

This was *mandamus nisi*, calling upon Judge Johnson to show cause why he did not certify a bill of exceptions in Isaac Coleman *vs.* Ransom & Company, or endorse thereon his reasons for not doing so.

He answered that the case of Isaac Coleman, and Hannah Coleman *vs.* Ransom & Company, and the cross bill of Ransom & Company were heard before him in May Term, 1870, and much oral and written evidence was introduced; that he held that there was no equity in Hannah Coleman's bill. She excepted, and "after the trial presented her bill of exceptions, which was duly signed and certified" by him; that "after the verdict, Isaac Coleman made a motion for a new trial on several grounds, of facts recited therein erroneously, and not truly and fairly presenting the case; that no brief of the evidence, at the time the motion for a new trial was made, had been agreed upon by counsel, or approved by the Court; that it was, however, agreed by counsel that the motion should be heard without the brief of evidence, and that it should be made out afterwards, and if the attorneys could not agree upon it, the Court should decide and pass upon the difference between them, in relation to the same." He further said that "under this agreement, the Court heard the motion, and refused a new trial. No bill of exceptions has, by Isaac Coleman or his attorneys, been presented to him for, or

on account of any ruling in said cause, nor has he been in formed that any brief of evidence has ever been agreed upo by the parties, and none has been approved by him. Lon after the time for presenting and signing bills of exception had elapsed, Coleman's counsel called upon him and said h had a bill of exceptions in the Coleman case, and asked hin to endorse upon it his refusal to sign it, and he replied tha no bill of exceptions had been presented, and for that reaso refused to make the endorsement." He closed by reiterating that "no bill of exceptions has been presented to him by Isaac Coleman, or his attorneys in said case," and that he did not know the averments in the exhibits to the petition served upon him, as he was not served with a copy, and prayed tha the rule be discharged.

It appeared by the affidavit of Isaac Coleman's counsel tha several days before the end of the time for presenting the bill of exceptions, a brief of the oral evidence prepared by them was taken to Chappell & Russell, counsel for Ransom & Company, and because they differed so widely as to its correctness they were asked to accompany them to the Judge's residence that he might decide upon these differences. Chappell & Russel objected, because there was no copy of the interrogatories attached to the brief, but went and they found the Judge had left for his plantation. They then had Hannah Coleman's bill of exceptions and Isaac Coleman's sent to Judge Johnson. They did not attach the brief of evidence to either bill of exceptions, because it was not agreed upon, expecting to attach one when agreed upon or approved by the Court; meanwhile they were having the interrogatories copied. The day after the time for certifying bills of exceptions was out the Judge returned them both bills of exceptions without his signature to either, and without any endorsement on either, but remarked that they were incorrect. Upon counsel's agreeing to alter Hannah Coleman's bill of exceptions to make it what the Judge said it should be, he agreed to sign *it*, but refused to sign Isaac Coleman's, because it was incorrect, and

had no brief of evidence attached to it. He was then told how his absence had prevented the revision of the evidence, etc., and counsel proposed then and there (Chappell & Russell being present) to submit the oral evidence for revision. The Judge refused to have that done, and refused to give further time to perfect the bill of exceptions. He further swore that the exhibits to his petition were the bill of exceptions of Isaac Coleman, the oral evidence, as he had prepared it, and a copy of the interrogatories. Further, he swore that in January, 1872, he asked the Judge to endorse upon said bill of exceptions his objections to the same, and that he refused to do so.

1. After argument had, the Court discharged the rule. They said that it was not a good bill of exceptions without having *some* version of the evidence, and that it ought not to have been certified in the form in which it was presented.

2. And further, they said that when he handed it back to counsel without his certificate, they should *then* have asked him to endorse his reasons for refusal thereon, and if he would not make it, *then* to have called upon this Court for a remedy; but they waited too long. Rule discharged.

FARROW & THOMAS; THOMAS, for movant.

CHAPPELL & RUSSELL, by REPORTER, for respondent.

J. P. SPIER, plaintiff in error *vs.* C. E. LAMBDIN, defendant in error.

(This cause was argued while Warner, C. J., was sick, but the opinion was not delivered till the 30th of March, 1872.)

BY TWO JUDGES.)—When A, a school teacher, was induced by B, another school teacher, to purchase of B the lease of an academy, under inducements held out by B that, if he could sell, he would quit teaching in the locality, and, on these inducements, the purchase was made: *Held*, that equity will enjoin B from teaching a school in the locality, during the lease.

Injunction. Restraint of Trade. Statute of Frauds Tried before Judge GREEN. Pike County. Chambers February, 1872.

Spier's bill against Lambdin made this case: In 1867, the trustees of the Barnesville Academy leased the academy and grounds to Lambdin, for ten years, in consideration that he would fence the lot, keep the premises in repair, and teach there a school during said term, with a full corps of teachers. In 1870, Spier was teaching school, also, in Barnesville, with one Lewis as his assistant. In the fall of 1870, Lambdin proposed to sell the unexpired term of said lease to Spier for $475, with the consent of the trustees. To induce Spier to accept his offer, Lambdin said his own health was bad, and that he wished to abandon school teaching, did and would use his influence and patronage for Spier's benefit, and Spier would have but little opposition in said town. Relying upon these representations, Spier accepted his proposition, and paid him nearly all of said $475, and now tenders him the balance. But for them he would not have made said trade. Yet Lambdin, in January, 1872, is about to open a school in said town. This will injure Spier in an uncertain amount. He prayed that Lambdin be enjoined. A temporary injunction was granted, and Lambdin was ordered to show cause why it should not be continued. Lambdin answered that the whole trade between them was in writing, which he exhibited. It was signed in October, 1870. By it, in consideration of $475 to be paid, Lambdin transferred said lease to said Spier and Lewis, and they agreed to carry out his covenants with said trustees. He denied making any promise not to teach in Barnesville, or any representation that he would not. He set up that he was going to open only a select school, of limited number, and that those who were going to patronize him, but with one exception, would not send to Spier, even if he (Lambdin) did not teach.

On the hearing, Lewis made affidavit that Lambdin did hold out such inducements to have his proposition accepted; that he (Lewis) paid no part of the $475, and had no interest in the trade, though the paper was to him and Spier, as aforesaid. Spier's brother testified to having seen two letters from Lambdin to Spier, in which he said his health was bad, and he wished to abandon teaching, and therefore would sell out. And it appeared that, at the time of the trade, Spier had ninety-six students, and Lambdin but twelve.

Lambdin produced the affidavits of various persons, that they had contracted with Lambdin, to teach their children, during 1872, and that they did not desire to nor intend to patronize Spier.

Upon argument had, the Chancellor refused to extend the injunction, and dismissed the bill. That is assigned as error.

JOHN F. REDDING, for plaintiff in error.

J. A. HUNT, for defendant.

McCAY, Judge.

We think there is equity in this bill. The complainant, as he states his case, is about to receive a damage, recognized by law as a wrong, and for which the forms of the law side of the Court do not furnish an adequate remedy. The answer does not (except by argument and inference) meet the charges in the bill. It does distinctly say that the money paid was paid in consideration of the lease; but, we think, there was a cautious shunning in the answer of the charges in the bill on the real merits of the case. The point of the bill is, that the distinct object and purpose of the purchaser was to get the defendant out of the way as a teacher, and that this was the mutual understanding. It may well be true that the *lease* was worth the money paid, and also very true that the complainant would never have thought of buy-

ing, except for the special reason charged—that if the defendant could sell, he would no longer teach a rival school.

If this was by distinct, positive agreement, it might very well have not formed any consideration for the money paid for the lease. In other words, the complainant might be willing to give that much for the lease, led by the other consideration, that, in buying the lease, he was securing a school without any competition from the defendant.

If this was the case, and that is what the bill charges, the arrangement by which defendant was to quit, and not set up any rival school, was not necessarily part of the sale of the lease, but an independent contract, for which the lease-contract was the consideration. There is just such a case as that in 30 Georgia Reports, *Mell vs. Mooney*, 414.

If this be true, if this was an *independent* contract for which the agreement to buy the lease was the consideration, then it may be proven by parol, notwithstanding the lease-contract was reduced to writing; since it forms no part of it, but stands on its own terms, to-wit: it is a contract for which the other *contract* is the consideration. But, even if it were required to have been written, does not the letter of defendant, mentioned by Spier's brother, in his affidavit, fulfill even the statute of frauds?

There is, however, a view of this case which is conclusive. According to the statements of the bill, (and in this respect the answer is not contrary), this contract to purchase the lease was procured by representations of defendant, that if he could sell he would quit, or intended to quit. The complainant was induced to buy by these representations. If they were made in bad faith, the contract was procured by fraud, since the complainant states that this expectation was the motive that led him to buy.

The defendant will not, if this be true, be permitted to fly in the face of his inducements to turn his own contract into a fraud. The remedy at law would be either to rescind the contract and sue for the money, or bring an action for dam-

. But the complainant has a right, if he pleases, to stand
is contract. He is not bound to rescind. He has, there-
only his remedy for damages.
this an adequate remedy? How can they be got at?
it is the measure of them? How can it satisfactorily ap-
that any particular patron has or has not been influenced
his opposition school? That a child is sent to it is no
on for saying that if one were not there it would be sent
mplainant. To get at the truth would require a look-
into the private motives of every parent in the commu-
. We think, therefore, the injunction ought to have
granted.
et the case go to a jury on the evidence, and if the defend-
has, either by express contract or by representations on
h the complainant acted, put himself in such a situation
at it would be a breach of his contract, or a fraud upon
plainant, to set up a school in the neighborhood during
ontinuance of this lease, the injunction ought to be per-
al.
udgment reversed.

. DENT *et al.*, plaintiffs in error, *vs.* J. H. COOK, Ordinary, *et al.*, defendants in error.

WO JUDGES.)—The Ordinary of a county has no authority under any
neral law of this State, even with the recommendation of the grand
y of the county, to borrow money on the credit of the county, and
for this purpose he issue county bonds, and sell them, the county
not liable on the bonds so issued.
n a proper case made by bill, in the name of the citizens of the
nty—tax-payers—it is the duty of the Judge of the Superior Court,
Chancellor, to restrain, until the hearing on the merits, an Ordin-
from ordering such bonds to be paid by the treasurer of the coun-
Provided, the injunction be so framed as not to interfere with the
ts of bondholders who are not parties to the bill, to the use of
y remedy allowed by law, through the Courts of law and equity,
est and enforce any claims they may set up against the county in
premises. 20th February, 1872.

County Matters. Ordinary's Powers. Tried before J
WRIGHT. Coweta county. Chambers. November, 1

Dent and others filed a bill against Cook, making th
lowing averments: They are citizens of Coweta county
tax-payers therein; Cook is its Ordinary; as such he m
contract with one Hackney to build a jail in said co
which Hackney did, and Cook paid him partly with
in the County Treasurer's hands, and then, as Ordi
issued bonds of the county and sold them at a discoun
thus obtained enough money to pay off the balance c
debt. He paid off Hackney, and himself used the ba
claiming that the county owed him. He then levied a
tra tax to pay said bonds, some of which were near m
ity. They contended that he had no right to issue
bonds, that the county was not bound by them, and
the Chancellor to enjoin the payment of them by Co
the treasurer. The bill made various charges of wro
the contracting of said debt and in the expenditure c
money. But neither these nor the reply to them are n
sary, as the case turned here upon the question of author
the Ordinary so to bind the county. Cook showed th
jail of said county had burned down, and that the grand
recommended that the "Ordinary proceed to have a goo
sufficient jail-house erected in this county, and make arr
ments for the same by issuing county bonds, running t
turity in one, two and three years." And he issued
bonds under said recommendation, and contended th
acted thereon within his lawful authority. The Chan
refused the injunction, and that is assigned as error.

S. FREEMAN; L. H. FEATHERSTON; J. B. S. DAVI
HUGH BUCHANAN, for plaintiffs in error.

DOUGLASS & WRIGHT, for defendant.

McCAY, Judge.

1. The question presented in this record is a very grave one. If the Ordinaries of the several counties of this State have the power to borrow money and negotiate bonds for that purpose, there is a serious defect in our law. Such a power entrusted to the discretion of one man, is so liable to abuse, so dangerous to the public interest, and so little needed for the proper purposes of a county organization, that if it does in fact exist, the law ought to be forthwith repealed. But we do not think such a power exists. The Ordinary, it is true, is clothed by the Constitution of 1868 with the powers of the Inferior Court, and the management of county affairs is in his hands. Constitution, Article 5, section 5, paragraph 1; and Article 12, section 7.

But the powers of the Inferior Court are specially pointed out by law: Code, sections 346, 347, 4057, 529, 530, 531, 536; and as well from the nature of the thing as by the positive provisions of the statute, they had no powers, except such as were specially granted. Indeed, section 4057 of the Code, in declaring the jurisdiction of the Inferior Court for county purposes, seems to have been designed for the specific purpose of announcing that to be the rule. It is in these words: "Said Court may have and determine all matters over which the *law gives the justices jurisdiction.*"

If they have a power or a jurisdiction, it must be one declared by law. There is no reserved, general power in that tribunal. It must have a grant for every power it claims. It is not pretended that there is any special grant of the power to borrow money. It may, it is true, make contracts. But a close inspection of the provisions of the Code will show that all the contracts it may make, must be in reference to the specific things it is made their duty to supervise.

In section 346 it is said: "They may direct and control the property of the county, as they deem expedient, *according law.* They may lay general and specific taxes, *according*

to the provisions of the Code," etc., etc. The county, it is true is a corporation. Code, section 825. But this is only fo certain specific purposes. This section of the Code is no even to be understood as putting counties on a footing of or dinary municipal corporations, such as cities and towns They are created, and have special duties and special privi leges, regulated by the charter of each, are sought for, an their charters may be forfeited, or lost by non-user and th judgments of Courts. But the counties are subdivisions o the State, imposed upon the people for State purposes. The are, in fact, but *quasi* corporations, and this section of th Code is not to be understood as conferring any powers, excep the right to sue and be sued, since the other powers are a conferred and regulated by other statutes and provisions o the Code. Indeed, the Act of 1863–4 calls them corpora tions, or *quasi* corporations.

It may be noted, too, that there is no provisions conferin on the Inferior Court, or Ordinary, the functions of mana gers of the counties. Indeed, all the powers of the county as well as all the powers of the Ordinary, are specially de fined and regulated by law. The Ordinary is a State officer commissioned by the Governor, and his duties are pointe out by the general law.

It may also be said that the various special Acts of th Legislature, of which the pamphlets containing the laws ar full, authorizing the counties to borrow money for specia purposes, is a strong indication of the opinion of the Legis lature, as well as of the opinion of intelligent county officers An Ordinary has power to make all contracts, necessary an proper, to perform the duties cast upon him. He can build Court-houses, jails, etc., and he may make contracts for tha purpose, and contract a debt for that purpose. But th raising of money to pay that debt is pointed out by law, to wit, by taxation, in the method prescribed.

It is inconceivable that the Legislature ever contemplate that the old Inferior Court could borrow money to carry o

its county affairs. Some provision, some mode of exercising the power, would have been prescribed. If the power exists, it is at the discretion of the Ordinary. He determines on the propriety of borrowing. He negotiates for the money, issues the bonds, executes them, receives the money, and expends it. He is, in no place in the Code, clothed with such powers. Great care is taken to elaborate checks and counter-checks against county officers. But here is one with power to get as much money as he pleases, and use it as he pleases. We do not think such a power exists.

We do not say that if the Ordinary has expended, for the public use, the money of any citizen, that the county is not liable for the money. We simply say that the Ordinary has no power to borrow money, and to bind the county by *contract* to repay it.

We recognize the right of any citizen, however, to compel the county to pay any money of his that has gone to its use. And whilst we think this injunction ought to have been granted, as prayed for; to-wit: to prevent the Ordinary, by his mere ordinary order on the treasurer, from paying these bonds; yet, we do not intend, in any way, to interfere with any use by the creditor of any process or proceeding, to bring his claims against the county, whatever they may be, before the proper Court for adjudication.

Judgment reversed.

ROBERT H. MCCROSKEY, plaintiff in error, *vs.* JOSEPH A. MABRY, defendant in error.

(BY TWO JUDGES)—1. Where a factor is sued in another State for the price of goods consigned to him, which he had sold, and pleads that he has fully accounted with his consignor, and paid him, which suit is determined against him, and judgment rendered in favor of the consignor, the factor is estopped from afterwards suing the consignor for expenses incurred in preparing said goods for sale and for freight

paid by him on the goods, and advances made upon them and commissions, where such former judgment is pleaded against him.

2. Whether a citizen of Georgia is liable to pay taxes on an open account due him by a non-resident—quere. 12th March, 1872.

Former recovery. Relief Act of 1870. Tax. Before Judge HOPKINS. Fulton Superior Court. October Term, 1871.

This was an attachment upon an open account by McCrosky against Mabry as a non-resident. The character of their suit and of the defense is stated in the opinion. After the evidence *pro* and *con* was introduced, both upon the merits and as to to whether McCroskey had paid taxes on the claim (which was an open account made before June, 1865,) and after argument had, the Court charged the jury among other things by reading to them the fourth section of the Relief Act of 1870, and said that they should inquire whether the claim had been regularly given for taxes and the taxes paid, and if they were not satisfied that these things were so, they should so find.

McCroskey's counsel had contended in argument that no taxes were due on the claim because Mabry was a non-resident of this State, and because, until the judgment was rendered in Tennessee (which was since June, 1865,) the parties had mutual accounts against each other about equal, and the case was not covered by the Relief Act.

The jury found that the taxes had not been paid and the Court thereupon dismissed the cause, under said Relief Act. A motion for a new trial, upon the grounds that his said charge and dismissal were wrong, (and other grounds not neccessary here) was overruled. Upon that error is assigned.

R. ARNOLD; E. N. BROYLES, for plaintiff in error. The claim was not taxable: Morrison *vs.* Warner by this Court, Oct., 1871, and Kelly *vs.* Carter, Feb'y, 1872; Rev. Code, sec. 798; 14th Ga. R., 379; 15th, 521; Aiken *vs.* Cameron by

ourt, Sept. 20th, 1871, and Ezzard *vs.* Worrill, Feb.,

L. MYNATT relied on Relief Act of 1870, and said aside plaintiff could not recover; the former recovery ıed him: 2 Phil. on Ev., secs. 35, 41, 42; 7th Ga. R., 136; 31st, 34; and 2 Kernan N. Y. R., 150.

NTGOMERY, Judge.

is was an attempt by a factor to recover from his con- expenses incurred and remittances made, on account ods consigned to him for sale. He had been sued in er State for the price of the goods, and there pleaded ıe had fully accounted and paid for the goods. These were found against him. One item of the claim in ıtachment suit was a bureau sold to the defendant for after the foreign suit had been commenced. To the ıment suit former recovery was pleaded, and the record e foreign judgment offered in evidence. It was also ed that plaintiff in attachment had not paid taxes on aim, (it being founded on a contract entered into before 1865,) and the jury, to whom an issue made on this was referred, so found.

We think the former recovery was well pleaded in es- . The suit is evidently for amounts set up in the former ıy way of defense, and which the present plaintiff, and defendant, failed to prove on the trial. He is, of course, ed to recover the price of the bureau sold to defendant, the commencement of the former suit.

We doubt if he was obliged to pay taxes on an open ac- , due him by a non-resident on a debt founded on a act made before June, 1865. It is, however, not neces- to decide that question.

e affirm the judgment of the Court below, provided ıdant in error will confess judgment to the plaintiff in.

the case for $20, the price of the bureau sold in 1866. Otherwise, the judgment to be reversed.

Our judgment upon the more important issues presented, is stated in the head-notes.

E. G. and E. S. PROTHRO, executors, plaintiffs in error, *vs.* ALBERT WORD *et al.*, defendants in error.

The certificate of the Clerk should identify the papers sent up. R.

Equity from Stewart.

To the bill of exceptions in this cause was a certificate that it was the true original, and that "the foregoing pages is a true and complete transcript of the record in the case of A. R. Word and wife *et al. vs.* E. J. Prothro and Emeline S. Prothro, executor and executrix of Nathaniel Prothro, deceased."

That seemed to be the case specified in the bill of exceptions. There were no "foregoing pages." But tied up with the bill of exceptions were seventeen other papers, being a bill in equity, an amendment thereto, an answer and exceptions thereto, etc., each separate and distinct from the other. It was said that these were the "foregoing pages," and that it would appear by an inspection of them. The Court would not inspect them. Upon motion of counsel for defendant in error the cause was dismissed, because the record had not been certified according to law. 24th February, 1872.

JOHN T. CLARK, for plaintiffs in error.

MOSES & DOWNING, for defendants.

JAMES C. COOK, plaintiff in error *vs.* PRIDGEN, STAPLER & DUNN, defendants in error.

(BY TWO JUDGES.)—1. A parol license to one to enjoy a permanent easement upon the land of another, (as to back water upon it) is an interest in the land, and must be in writing, by the Statute of Frauds, and is void at law.

2. But if the licensee, in pursuance of the license, goes forward, and for the enjoyment of the easement makes large investments, and the easement be one in its nature permanent, equity will decree a specific performance as in other cases of a part performance, by one party, of a parol contract for the sale of lands.

3. In this State, when a defendant in a suit at law might, by going into equity for specific performance, defeat the plaintiff's action at law, he may set up his equitable defense at law. 5th March, 1872.

Water-courses. License. Prescription. Equity. Practice. Before Judge HARRELL. Muscogee Superior Court. June, 1871.

In 1869, Cook sued Pridgen, Stapler & Dunn, averring that in said year he owned certain described land and they erected a mill-dam below it, and thus overflowed and injured said land. Besides the general issue, defendants pleaded as follows: Cook's land belonged to Cook's father during 1838 and until his death in 1864, then for life to Cook's mother, till she died in 1864, then to Cook and his sisters, as remainder men; that in 1838 Jones owned the land next below said Cook's, where the dam is, and owned it until 1864, when he died; that his administrator then sold it to defendants; that in May, 1868, Jones began building a dam across the Chattahoochee river and a mill, the dam to be five feet high; that while Jones' agent was building the dam, Cook frequently was present and inquired as to the probable extent of back-water which such dam would cause; that said agent explained to him the level, and said if the dam was five feet high the water would be raised a foot above its natural height at Cook's line, and that by making the dam six feet high the raise at Cook's line would be two feet, and told Cook

that it was very desirable to have the dam six feet high, and asked Cook to allow him to make it six feet high; that Cook said he did not believe that a raise of two feet at his line would overflow his lowlands or injure them, and told the agent he might make Jones' dam six feet high. Thereupon, with Jones' approval, the dam was so built and finished in 1869. At the same time Jones built a valuable mill and put in machinery, to be run by water raised by said dam. The dam cost Jones $5,000, and the mill and machinery cost $10,000, which expense was incurred by reason of said Cook's said permission. That Jones kept up the dam and mill while he lived; his administrator kept them up till in 1865, when the United States forces burnt down the mill, and then the administrator sold the dam (which was as it had been) and land to defendants, who rebuilt the mill at a cost of $10,000, relying on said license; and during all of said time, from 1838 until this suit was begun, said overflow had been continued without interruption as aforesaid.

The evidence on the trial as to the title of the parties to their respective land was as stated in the plea, plaintiff having acquired the whole title to his land by purchasing his sisters' interests, one in 1854 and the other in 1868. Plaintiff proved that part of this dam was washed away in 1841; that it was rebuilt, one end exactly where it had been and the balance a little lower down; that it was all washed away in 1855 and again rebuilt, where it was the last time substantially, but part of it a little lower down. Plaintiff gave evidence that the dam was broken when defendants bought. He also had evidence that the dam raised the water at Cook's line about five feet above its natural level, and that he notified the parties in 1855, and that when defendants repaired the dam that he would sue them for damages. He showed the *quantum* of damages. Defendants proved the facts averred in their plea, and gave evidence tending to deny plaintiff's complaints at building, repairing, etc., as aforesaid. In rebuttal, plaintiff showed, among other things, that for

many years during said overflowing his said sisters were minors and then *femes covert*

The evidence closed. The Court explained to the jury the nature of the action, and told them to find for the plaintiff the damages proved, if the defendants had overflowed his land, unless the defendants had made a good defense. As to the defenses, he charged as follows: "They set up several special pleas, which may be briefly designated by calling them pleas of 'License,' 'Prescription' and the 'Statute of Limitations,' which I will explain to you in their order. The defendants, under their plea of license, say that they are not guilty of trespassing on the plaintiff's land, because, they say, that, if the water is backed on plaintiff's land, by reason of their dam, it is not backed over two feet, and that they are purchasers for value of Seaborn J. Benning, as administrator of Seaborn Jones, of the lot of land on which their dam is situated, with all the rights, members and appurtenances thereunto belonging, and that one of these rights was a right to back water on plaintiff's land, to the height of two feet; that this right arises from an agreement of purchase, or, in other words, a license acted upon, between James Cook, the ancestor of the present plaintiff, and Seaborn Jones, now deceased, the intestate of the vendor, Seaborn J. Benning. You have heard the evidence upon this point; you will weigh it well, and apply to it the following rules of law: You will first determine whether the license the defendant sets up was a gratuitous license, or whether it was a license upon valuable consideration, if you shall consider such a license was ever granted. If it was a gratuitous license, it is no justification to the defendant, because a gratuitous license is of the nature of a personal privilege; it is revoked by the death of the grantor, and also by the assignment or sale of the property to which the privilege or license was attached. But, if the license set up was granted, and was a license upon valuable consideration, then the defendants are justified backing water on the plaintiff's land to the extent of two

feet, if you believe the license was for two feet. So that if you determine the defendant's dam backs water on the plaintiff's land, and that there was no license granted to Jones by Cook, or, if granted, it was a gratuitous license, or if it was a license for value, and you should find the water is backed over the height allowed by the license, in each of these cases you would find for the plaintiff such amount of damages as the proof may show he has sustained. But, in the last-mentioned case put, viz., if a license was granted for a valuable consideration, and the amount of back-water exceeds the amount allowed by the license, the damages you would allow would not be the whole amount of damages sustained by the plaintiff by reason of the back-water, but the amount of damages sustained by reason of the excess of back-water over that allowed by the license, if any such you should determine there is. In saying that you will find for the plaintiff in the cases put, I mean so far as the defense set up by the defendant in this plea of license is concerned. I will hereafter give you the rules of law in charge, as to the other defenses set up by the defendants. If, on the other hand, in considering the question of license, you should determine that a license was granted upon valuable consideration, and that the back-water does not exceed the amount allowed by the license, then you need go no further, but will return a verdict for the defendant. And to determine whether the license, if granted, was a gratuitous license, or a license for a valuable consideration, I give you this rule of law in charge: If, at the time of granting the license, or afterwards, Mr. Cook received any benefit, or Mr. Jones sustained any injury, then this benefit or injury would be a valuable consideration that would support the license. If the evidence shows that at first Jones intened to build a dam five feet high, and afterwards, by reason of and acting upon the faith of the license granted by Cook, he went to additional expense to make his dam six feet high, or in any way added to his mill, then this additional expense or injury to Jones

would be a sufficient valuable consideration to support the license, and to render it irrevocable.

"The plaintiffs, in this case, insist that this would be allowing an interest in land to pass by parol. Ordinarily, I tell you that an interest in land can only be passed by writing; but, where A sells land to B by parol, and B pays the purchase-money, the law will not allow A, after receiving the purchase-money, to set up the Statute of Frauds. So, in this case, if Cook granted a license to Jones, and Jones gave valuable consideration for it, in the manner I have explained to you before, then the law will not give to Cook, or those claiming under him, the benefit of the Statute of Frauds. So that on this point the case reverts back to the original questions—was a license granted? Was it a gratuitous license? Or was it based on a valuable consideration, and, if on a valuable consideration, has it been exceeded?

"If you should determine in favor of the plaintiffs on the general issue, and on the special plea of license, you will next consider the plea the defendant sets up of prescription.

"In this plea defendants do not rely on any original license, but set up that the successive and continued possession of Jones, Benning and themselves, of the land of plaintiff, covered by the back-water, has been continued and adverse to the plaintiffs for a period of over twenty years. It is unnecessary to explain to you what is continued; but, as to adverse possession, I will say, that, if the defendants have occupied the land of plaintiff by their back-water in such a way as that the plaintiff could not have as full and perfect use of their land as they might otherwise have done, then this would be an adverse possession; and if it has continued for twenty years, it would make a perfect title, and the plaintiff would not be entitled to recover. The plaintiff, however, sets up that James Cook died in 1844, and that from then until 1864, the legal owners of the remainder in the land after carrying out Mrs. Cook's life estate, were,

except himself, minors and married woman, and that it was a joint right of action, and therefore that this period of twenty years should be carved out of the time claimed by the defendants. This would be true, if the married women and minors were the plaintiffs in this action; but, as they sold their interest to the plaintiff, who was of full age, he cannot set up their minority or coverture. This is a personal privilege, which they alone can take advantage of.

"The next defense set up by the defendants is the Statute of Limitation of seven years. If the defendants' grantor, intestate Jones, exercised the right of backing water on the plaintiff's land for seven years, continuously and adversely, previous to 1852, then, by this occupation, he acquired a perfect title, whether it was under written evidence of title or not, and if, since 1852, he has so occupied it for seven years, under written evidence of title, this gives him a good title. And you will find for the defendants, if you find that they and those they claim under have occupied the land of plaintiff by backing water for twenty years, continuously and adversely, or if they have so occupied it for seven years, previous to 1852, or for seven years since 1852, under written evidence of title."

The Court here closed its charge, and the plaintiff requested the Court, in writing, to charge as follows:

REQUESTS TO CHARGE.

First request. "If you believe, from the evidence, that plaintiff's ancestor granted a license, by parol, to defendants to overflow the land of plaintiff, this permission is revoked by the death of the ancestor from whom the license is claimed."

This charge the Court refused to give, as asked, but gave, with this addition: "This is true, unless it was an agreement by Cook that Jones should have the right to use his land in this manner, and it was executed by Jones in so using it, and expending money in order to so occupy it."

Second request. "A parol license to overflow lands given

by James Cook, deceased, to Seaborn Jones, deceased, is not a justification of the trespass complained of by defendants. If the trespass has been committed, defendants, as the assignees of Jones, cannot justify under a license given by the ancestor of plaintiff to the defendants' grantor." This charge the Court refused to give, as asked, but gave, with this addition: "This is true, if it was only a gratuitous privilege given by Cook to Jones, but if, by occupation and valuable improvements, or the expenditure of money by Jones, under an agreement made with Cook, he acquired property in the land for the purpose of backing water, or the right to back water, then Jones had a title to it to that extent, and one that he could assign, and if legally assigned to defendants, they were not trespassers."

Third request. "If a notice is in proof from plaintiff to defendants not to repair the dam, as it would overflow his land, this would make the defendants liable, if, after such notice, they did repair the dam, and by so doing overflowed the lands of plaintiff." The Court refused to give said request, as asked, but gave it with this addition: "This is true, if it was a mere gratuitous privilege, or if the water was raised beyond the agreement. But if there was an acquired property in Jones, and legally assigned to defendants, it would not be true if defendants only raised the water to the height of the first agreement."

Fourth request. "The right to overflow land of another is an incorporeal hereditament; it is such an interest in land as cannot, by law, be created by parol." This request the Court refused to give, as asked, but gave with this addition: "This is true, except, by a provision of our law, it was an executed agreement and a valuable consideration paid by Jones."

Fifth request. "The defendant is estopped by his pleadings, from setting up a title by prescription. Such title must be made out by an adverse possession. If the possession is permissive, the title by prescription only commences to run

from the time that notice is given of an adverse possession;" which charge the Court refused to give, as asked, but gave with this addition: "This is true, if the possession was permissive only, but if paid for and held under a claim of right, against the grantor himself, it becomes adverse to that extent."

Sixth request. "The statute does not run against married women or minors; and where the title to land is joint, and some of the owners are minors, and others of full age, the statute does not run against any of them until the disabilities of all are removed." This the Court refused to give as asked, but gave with this addition: "This is true; but if the title is passed from those under disabilities to one who is not, he cannot claim this provision of law. These are special provisions for certain classes, and a purchaser who himself is under none of these disabilities, gets the title to the property, not the personal privileges of his vendor."

The jury found for defendants. The plaintiff complains that each part of said charge adverse to his claim is wrong, and that the Court erred in qualifying each of said requests as he did.

MOSES & DOWNING; PEABODY & BRANNON, for plaintiff in error. Parol license revocable: 24 Ga. R., 182; especially if it does not injure the grantee thereof to revoke it: 14 Ga. R., 1; 24th, 181. Such a license confers no estate in land and gives no right to rebuild: 8 A. and E. R., 777; 5 B. and C. R., 227; 2 Am. L. C., 531; 1 Dev. and B., (N. C.) R. 492. No adverse possession by one holding by permission of plaintiff: 21 Ga. R., 457; 7th, 388.

H. L. BENNING, for defendants. Parol license acted upon irrevocable: 28 Ga. R., 589; 3d, 82; 12th, 239; 5th, 315. Brown on Statute of Frauds, sec. 31; Rev. Code, secs. 1961, 2698, 3133. In such cases licensee estopped: Rev. Code, 3700, 2915; 12 Ga. R., 52. The license runs with the land: 3 Ga. R. 84; Rev. Code, sec. 2647; 3 Kent's Com., 545.

This possession was adverse: 8 Ga. R., 1. Trespass barred by four years', and ejectment by seven years' possession, if Cook's death revoked the license: 8 Ga. R., 1. All were barred; tenant could have brought trespass and remainder-men case: 1 Arch. N. P., 406, 447; Sedg. M. of Dam., 149; 3 Black, 229. Statute runs against one voluntarily under disability: Rev. Code, secs. 2875, 2876. Adverse possession for twenty years title against all not under disability: Rev. Code, sec. 2640; 3 Kent's Com., 542–3.

McCAY, Judge.

1. We think the authorities, taken all together, establish this proposition, that a *permanent* easement on the land of another is an interest in the land; and a parol license to enjoy such an easement is void under the Statute of Frauds: 4 East. R., 109; Hurlins *vs.* Shipman, 5 B. & C., 221. See also 8 B. & C., 298; 4 Ad. & Ell., 329.

There is, without question, some confusion in the authorities; but we think the true distinction, which will reconcile most of them, is between a permanent right, one in its nature such that the parties must have contemplated its continuance, and a mere permission to do something on land, which, from the nature of the thing, is temporary only: 2 Hilliard, Abr. Am. L. Real Prop., 52; Angel on Water Courses, 286. Without doubt there are cases inconsistent with this view. But it will, we think, be found that, generally, these cases may be explained consistently with the distinction we have alluded to by considering the forum, whether at law or in equity, in which they have occurred.

A *license* even in writing is revokable. That is, if it show that it was the intent of the parties to give a mere license, and not a grant. In other words, a mere license is, in its nature, revocable; since that is the intent of the parties. If it be intended to be irrevocable, it is ordinarily a grant and must be in writing, or it is void *at law* by the Statute of

But it does not always follow that a license is revocable at the will of the party giving the license. Even a temporary license must be considered as intended to continue until the objects of the parties are attained, as where even in Courts of law it has been held that a *mere license* to overflow land with water, by a dam for a saw mill, cannot be revoked during the continuance of the dam; since it may fairly be presumed that the parties intended the license to last that long at least. But if the dam be destroyed, then, as the term of the license is out, it may be revoked, and this when the easement is a *mere license*, so that may be by parol. See Angel on Water Courses, section 293, and note, with authorities cited.

2. But, while at law an easement, in its nature permanent, must as it is an interest in land be in writing, signed by the party owning the land to be burdened, equity will compel the specific performance of a parol contract for such an interest in land on the same principles as it will other parol contracts for the sale of land: 4 S. and R. 241; 4 Watts 317; 2 Equity Cases Ab., 523; 2 Atkyns, 391; 3 Cain's Cases, 87. So that if one under a *grant* of an easement, though it be by parol, go into possession and make valuable improvments in pursuance of the grant, so that it would be a fraud upon the grantee to permit the Statute of Frauds to operate, equity will decree a title: Houston *vs.* Lafee, 46 N. H., 508. Here was a clear grant—the easement was in its *nature permanent*, a mill and dam of the character disclosed by the proof, must, in the nature of it, (not as a *saw-mill* or other structure necessarily temporary) be intended for a permanent investment, and in our judgment this permission was not a mere license but a grant for motives satisfactory to the grantor. The proof is, that the defendants acted upon the grant, went into possession, expended large amounts of money, and continued in possession for years.

3. Under our law, the defendant may set up, at law, any perfect equity—any right that needs nothing but a decree in chancery; and we think this was just such a case. We do

t discuss the other questions made in the record, or pass on them, as we think the case turns on the view of the r we have taken.

Judgment affirmed.

. B. BULLOCK, Governor, plaintiff in error, *vs.* E. E. CHISOLM *et al.*, defendants in error.

The Clerk having certified a record of a case different from the case mentioned in the bill of exceptions, the writ of error was dismissed. (R.)

After the case was dismissed for want of proper certificate by the Clerk, a proper certificate was procured and a motion made to reinstate the case. The motion was overruled. (R.)

Practice in Supreme Court. From Fulton county.

The bill of exceptions recited that "the case of E. E. Chisolm and W. H. Clark *vs.* R. B. Bullock, Governor, being *certiorari* from the District Court," was heard, and the *certiorari* was sustained on the 19th of June, 1871, at Chambers, and that is assigned as error. The Clerk certified that it was the true original bill of exceptions in the case of the State *vs.* John Copraud, decided on the 19th of June, 1871, at Chambers." With this bill of exceptions, so certified, the Clerk sent a certified record. In it appeared that said Clark and Chisolm complained of certain alleged errors of the district Judge "in a proceeding by *scire facias* against them, a copy of which is as follows." That copy begins: "Whereas, John Copraud, principal, and E. E. Chisolm and W. H. Clark, sureties," gave bond, etc., etc. The Clerk certifies this as the copy record in the case of The State *vs.* John Copraud.

When the cause was called here upon motion of defendant's counsel it was dismissed, because the Clerk had not

certified and sent up the record in the case of Chisolm and Clark *vs.* R. B. Bullock, Governor.

Subsequently, counsel for defendant in error procured other certificates from the Clerk and moved to reinstate the case. This was refused.

W. G. IRWIN, District Attorney, for plaintiff in error.

L. J. GARTRELL; HENRY JACKSON & BROTHER, for defendants.

N. J. BAYARD, plaintiff in error, *vs.* MALINDA HARGROVE *et al.*, plaintiffs in error.

The same parties *vice versa*.

When the owner of a tract of land lays it off for a town, publishes a map of the lots, streets and lanes, and sells out the lots on a street to others, and the town is established as designated in the map, the owner of the land will be presumed to have dedicated the streets and lanes to the public, and if one of them be diverted from the purposes designated, as if under a sale from the city authorities, a house be builded on land that is part of the street, this does not authorize the original owner of the tract to sue in ejectment for the land so built upon. The title of the land is in the public, for the uses designated, so long as the town exists. If the street be abandoned by the public, *prima facie*, the reversion would be in the owners of the abutting lots, unless the injured grantor had in express terms reserved the right to himself in his deed conveying the lots, or in his act of dedication.

Streets. Dedication. Before Judge PARROTT. Floyd Superior Court. July, 1871.

This was ejectment by Doe upon the demise of the heirs-at-law of Z. B. Hargrove, against Roe, casual ejector, and said Bayard and another, tenants in possession, for the one-half undivided interest in a strip of land thirty-three feet wide, in Oostanaula street, Rome, Georgia. The defenses were the general issue and prescription.

Plaintiff traced title from the State into his lessors to the lot of land containing the premises in dispute, proved the possession by the defendants, and the annual value of the premises for rent, and closed.

For the defense it was shown, as follows: In 1834, Hargrove and others proposed to the Inferior Court of said county to give to them and the people of said county, parcels of said land lot, to be selected by said Court for a Court-house, jail, etc., etc., and "half of the proceeds of the sale of town lots on said lot of land," and keep up a ferry, etc., if they would permanently locate the county site at said place, and that this proposition was accepted and acted upon. The land was laid off into lots and streets, including said street, and the lots were sold. What the terms of the deeds to purchasers were, did not appear.

In 1849 or 1850, the Mayor and City Council of Rome concluded to sell a strip on each side of said street, from river to river, thirty-three feet wide, and ordered the same to be done. In 1850, one Johnson bought the premises in dispute from the said Mayor and Council, and took possession of it and began building upon it. From him, title was traced into the tenants in possession, and it was shown that they, and those under whom they claimed, had been in the actual possession of the premises and buildings thereon since 1852 till the commencement of this suit in March, 1869. Evidence, *pro* and *con.*, was introduced as to the *bona fides* of this possession, etc. There were six heirs-at-law of Hargrove, and to the prescription as to one of them, Mrs. Fort, it was replied and shown that she had been under coverture sufficiently long to avoid prescription. There was evidence of a sale by Hargrove to Shorter, but it is not material.

Pending the trial, various questions arose as to the admissibility of evidence, etc., but they are not passed upon here. The Court charged the jury as follows:

"This is an action brought by the heirs of Z. B. Hargrove, deceased, against N. J. Bayard, tenant, etc., for the recovery

of a certain store-house and lot in the city of Rome, Georgia. The plaintiffs claim title to the property as the heirs-at-law of Z. B. Hargrove, deceased, who, they allege, was the owner of the soil. They claim that this property is in the street, and that the street was dedicated to the town of Rome, or the county of Floyd, for public use as a street; that the public was entitled to use it as a street only; that it has been abandoned by the city of Rome as a street, and that, as Z. B. Hargrove did not part with the title to the soil, they now own it as heirs-at-law.

"If this street was permitted to be used as a street by the town of Rome, and it belonged to the plaintiffs, or any one else, the title to the soil does not pass to the town or county, unless there was a deed to the soil. When the owner of land is paid for a road or right-of-way over his land only, the county in which the road lies cannot transfer the land when the road or right-of-way is abandoned. But if such owner had made a fee-simple deed, then the city or county could transfer the title, if it did not interfere with the right of others. If there was no fee-simple deed to this lot, and it had been abandoned, then it reverts to the former owner or proprietor, or his heirs-at-law. There are two modes of showing title to land: one is by showing a chain of paper titles, beginning with the grant from the State and bringing the title down to the plaintiff in the action; all titles to lands emanate from the State. The plaintiffs insist on a perfect paper title to one undivided half of this land from the State of Georgia. You will, therefore, see, first, if there is a grant from the State of Georgia to lot number two hundred and forty-five, in the twenty-third district and third section of this county, and if so, whether this property is part of that lot. See to whom the State granted the lot. If it was granted to one Major Pace, then his title is perfect; next, you will see to whom did Pace make title. See if he made a title, as is claimed, to Phillip W. Hemphill, according to the forms of law; if he did, then that passes a perfect title to the lot to

ıill. Then see if Hemphill sold one undivided fourth Z. B. Hargrove, deceased, and made a title; next, see ıphill sold and conveyed, by deed, an undivided fourth liam Smith, and if so, whether Smith sold to said Hardeceased, that undivided fourth. If you find that the ıs been conveyed in this way, according to law, then idence shows a title to one undivided half in Z. B. ›ve, and it remains in him until divested in some way ır. If said Hargrove died intestate, then all his lands to his heirs-at-law; you will, therefore, see, from the se, who these heirs are; if the plaintiffs are the heirs, ıey have the title until it is legally divested; and if it ın now to be in them, they are entitled to recover, unis divested in some legal way. The defendant places ense, first, upon the contract between the original town ıy and the Inferior Court of Floyd county for the re- of the county seat to Rome. It is the duty of the to construe that contract. The Court, therefore, charges ıat the contract embraces a simple proposition to bind rties to it to do certain things, and that the said conoes not convey the land in the city, except certain lots Court-house, jail, churches, etc., to the city or the , and no title passes under it to the streets, and if there vidence showing that the title passed to the city or , then the defense on this ground fails.

plaintiffs must recover on the strength of their own nd they cannot recover, unless they show title to the ty. The second ground of defense is, that there is an ıding title to the property in another person, and that aintiffs have parted with the title; and to show this, ıd from the heirs of Hargrove to Alfred Shorter has ntroduced. It is the duty of the Court to construe ed also. The Court charges you that the difficulty ın one clause in the deed, which is as follows: "And also right, title, claim or demand," etc. (See copy of deed.) s an independent clause in this deed, and if there were

no other descriptive words of the property intended to be conveyed, it would, of itself, make a complete conveyance of all the property of the kind in the town of Rome. The Court construes this cause to convey all the town property that was owned by Z. B. Hargrove, deceased, in the town of Rome. You will see, therefore, whether this property was town property at the time said Hargrove died. Did it belong to him at his death? If so, it is transferred by this deed. If, from the evidence, you find this lot was not town property, it is not conveyed by the deed; if it was town property, it is conveyed. You are to ascertain whether it is town property or not from the evidence. See what the people of this neighborhood understood by town property; what the words town property mean. If the evidence don't show that it was Hargrove's property at the time of his death, it does not pass under the deed. But if he owned the title in soil, it belonged to him. If he owned it, either in possession, remainder or reversion, it belonged to him. You must take into consideration the circumstances connected with the making of the deed—not considering any parol testimony to contradict, add to, or diminish its terms, and if you find that the title to this property passed under this deed, then the plaintiffs cannot recover.

The third point of defense is what is known as the Statute of Limitations. The Code changes the phraseology, and it is called now title by prescription, but the same rule applies in both instances, and the Code expresses what the law was before and since its adoption. The Acts of 1856, and the Acts in force prior to that Act, applies to that case. If the defendant, or those under whom he holds, have held peaceable and adverse possession of this land, as provided by the Acts and the Code, for seven years before this suit was begun, then the plaintiff's action is barred, unless they were under disability as provided by law. The same principles were laid down in the Code, as you will see from the following sections: 2636, 2637, 2638, 2639, 2640, 2641, which he read.

hen the Statutes of Limitation are relied on, the posses-
must be such as named in the Code. It must be ad-
, continuous, uninterrupted and peaceable, and under
of title. The defendants insist that Riley J. Johnson
such possession, from 1850 to the time he sold to Wil-
Ramey, and that Ramey held such possession until he
to Bayard, and that Bayard has since held such posses-
If either of them held such possession for seven years,
it was public, peaceable, etc.; if they claimed under a
base with a deed or deeds, as a matter of right, and their
ssion was not simply *permissive on the part of the plaintiff*,
the defendant will be protected. You will see whether
property was claimed by these parties as their own;
her they were in the actual possession of it by an enclo-
or building on the ground. Actual, adverse possession
wenty years will protect the defendant without a paper
; seven years with a paper or color of title will also pro-
him, unless he holds under a forged or fraudulent title,
t forth in the following section of the Code. (Section
.)
ou will, therefore, see if there is any evidence that these
are forged or fraudulent, and if there is none, and the
dant has held the land as stated, he will be protected,
though his title was a defective one. A bond for titles,
deed with one witness, is a good color of title, and if the
dant, and those under whom he holds, believed they
buying the title, and acting in good faith, he will be
cted against all parties not under *disability to sue*.
any of the plaintiffs were minors, idiots or lunatics, or
ried women, then the statutes do not run against them until
they have arrived at full age, or their disabilities have
removed. The plaintiffs, by their counsel, reply to this
position of defendant, by saying that the erection of this
ding in the street is a nuisance, and that a nuisance can
er ripen into a prescription; that the Statutes of Limita-
s do not run against a nuisance. This question of nui-

sance has nothing to do with the title to the property. A person injuriously affected by a nuisance, or the public, may abate it, as you will see from sections 4024, 4027 of the Code. (See the section.)

A person who had bought property with reference to this street, or a citizen of Rome, could abate the nuisance, and the Statute of Limitations would not run against such a person. One may acquire title to property by adverse possession, and use for a sufficient length of time, as when the owner of a mill overflows the land of another for twenty years or more; this would give him the title to the land, and the right to overflow it, as against the former owner; but if his pond caused sickness in the neighborhood, any one so affected by it, could abate it as a nuisance—but such abatement could not affect the title—the abatement of a nuisance has nothing to do with the title to the soil.

If you find the plaintiffs are entitled to recover, you will find the value of the rents of one-half of the property, and give a verdict for the amount. And if Mrs. Fort is only entitled to recover, you will find what her interest is, and give your verdict for such a part of the property and rents, as you may find to be due her. If none are entitled to recover, you will find for defendant, with cost of suit.

The jury found for only Mrs. Fort for one-sixth of an undivided half interest in the premises, with mesne profits.

Each side complained of the rulings and charges adverse to it, and sued out separate writs of error. Here the cases were argued and decided as one. The specific points made in the bills of exceptions and briefs are not reported, because this Court passed upon but one of them.

SMITH & BRANHAM, for Bayard. Plaintiffs cannot recover possession of a street for their exclusive use. As to abating nuisances, see Washburn on Easements, 569 to 591; R. Code, secs. 4024, 4027; 39 Ga. R., 202. Dedication to public irrevocable: R. Code, sec. 2642; Washburn on Easements,

:9, sec. 20; 6 Vt. R., 355; 10 Peters R., 662; 1 Whart., 39; 27 Mo. R., 211; 18 Ohio R., 18; 8 B. Monroe (Ky.) R., 232, 247; 29 Mo. R., 356; 1 Sneed, 632; 9 Iowa R., 55. The owner can never retake an accepted dedication: Washburn on Easements, 140; 3 Vt. R., 521; 6 Wend. R., 51; 1 Ind. R., 432; 4th, 318; 10 John. R., 236; 22 Wend. R., 425; 24 Pick. R., 71; 6 Peters R., 498, 513, 431; 5 Taunt, 125; 4 N. H., 1, 13; 2d, 513; 5 Seld., 246; 35 Barb. N. Y. R., 395; 36 Penn. St. R., 29; 9 Wise Va. R., 240; 8 Metc. R., 236; 1 Sneed, 643; 12 Ga. R., 239. As to rights in highways and obstruction of same, see Washburn on Easements, 146(25); 36 Penn. St. R., 99; 2 Bay's So. Ca. R., 291; 6 Peters R., 498, 504; 29 Ga. R., 250. From these it appears dedicator has no more rights in dedicated streets than citizens. If once dedicated, and no provision made for forfeiture for misuser, no reversion to dedicator: 1 Ohio St. R., 478; 8 U. S. Dig., 15; 3d, 126; 8 B. Monroe (Ky.) R., 232.

UNDERWOOD & ROWELL; WRIGHT & FEATHERSTON; D. R. MITCHELL, *contra*. The owner of the fee in the soil of a road may maintain ejectment, etc.: Burr, 143; 2 Strange, 1004; 1 Wils. R., 107; 6 East. R., 154; 2 John. R., 363; 6 Mass. R., 454. Road abandoned, owner has right to possession: 6 Mass. R., 534; 10 Peters R., 25; 15 Howard R., 155; 26 Ga. R., 674. They cited various authorities to show that the authorities of a city cannot alienate its streets.

McCAY, Judge.

In the view we take of this case a great deal of the very learned and elaborate argument of counsel upon both sides is upon points which, though very material in one aspect of it, are yet unimportant in the determination, as we are of the opinion that the proprietors of this land, when they laid off the town, by lots, streets, lanes, etc., *and sold the lots*, parted with all

their rights over the streets, except so far as they or their children are part of the public.

It is, without doubt, true that the original owner of the soil retains the fee in himself when the public, in the exercise of its right of eminent domain, seizes a right of way over his land. And if the road or way be abandoned by the public, he has the right again to its exclusive use. But even in such a case, it does not follow that if the public permit a street or road to be obstructed, not abandoning the way, by this misuser, the right is lost, so that the original owner may sue for the land.

It is also true that, whilst, as a general rule, the ownership of a fee in a highway or street is *prima facie* to be considered as in the owners of the abutting land, yet this is only a presumption; and if the original owner of the land have sold the abutting premises, reserving his right in the soil of the street, or if his deeds so define the land sold as necessarily to exclude the fee in the street, then the fee remains in the original owner: Jackson ex dem. Yates *vs.* Hathaway, 15 John., 447; 6 Mass. R., 454; 10 Peters' R., 25; 15 How. R., 155; 26 *Ga. R.*, 674; 6 East. R., 154; Burrow's R., 143. And this rule, as to the reversion of the fee on the abandonment by the public of the road or way, may also apply to the case of an ordinary highway or other easement dedicated to the public, where nobody is interested but the dedicator and the public: Angel on Highways.

But there is a clear distinction by the authorities, and in the nature of the case, between a mere right of way seized by the public or dedicated to the *public* and the case made by this record. Here is a contract. The owner of the land proposes to lay out a town. He makes up a map, with the lots, streets, lanes, etc., marked upon it, and he not only agrees to dedicate the streets to the public, but he *sells the lots* abutting upon the streets. The public accepts the streets, the lot-owners buy the lots under these representations, and the

owner of the soil gets a consideration for his dedication in the increased price of his lots.

In this case there are three parties to the transaction, the owner of the land, the public, and the purchasers of the lots. And the whole affair is a matter of contract, for a valuable consideration. Especially is it true that there are more parties at interest than the public and the dedicator. The purchasers of the lots acquired a contract right in the street. They acquired the right to use it themselves, and the right to have the street open to all others whom they may desire to use it. This title is gone from the owner, except with the consent of the public and the lot owners. If the public were to forfeit or abandon it, this would not affect the rights of the lot owners. The owner of the land has parted with his right ever to assert his right to the soil to the injury of the easement.

If the street be obstructed or neglected by the public, there is a method of compelling the public authorities to keep open and unobstructed the street that, by a contract, was accepted. And even if it be abandoned by the public, the private right of the lot owners to its use remains. In the case of Barclay *vs.* Hansell, 6 Peters' Reports, 498, 504, the Court say: "Where the proprietor of a license disposes of his interest in it, he would seem to stand in a different relation to the right of soil in regard to streets and alleys of the same, from the individual of land over whose soil a public road passes, and who *continues* to hold the land on both sides of it." And again: "If the ground in controversy in ejectment had been dedicated for a particular purpose, and the city authorities had appropriated it to another and entirely different purpose, this might afford ground for a Court of chancery to compel the specific execution of the trust by restraining the corporation or by causing the removal of the obstructions." And this same doctrine is held in the case of Rowan's executors *vs.* The Town of Portland: 8 B. Monroe R., 236; Williams *vs.* First Presbyterian Church, 1 Ohio State R., 478; Guigar *vs.*

Filer, 8 Florida R., 332. And, as it seems to us, it is based on sound reason and equity. All that the owner of the soil sought by the dedication has been accomplished. It was not his purpose to favor the public. His purpose was to benefit himself, and that benefit he has fully secured. The town has been established, his land has been enhanced in value, and the lot-owners have paid him for his sacrifice. As one of the public he has his right to enforce the trust, but neither he nor the public can affect the rights of the lot-owners, which they have bought and paid for.

In this case there is no abandonment of the street by the public. The most that is claimed is that there is an obstruction in it. I do not think a case can be found where the original owner of the soil has been held to have the right to bring ejectment for the land on the ground that the public has permitted even a public road taken from him to be obstructed. Were he to recover the possession, then he would be obstructing the street.

When this street was laid off and the lots abutting upon it sold, and the lots upon the other streets sold, the owner of the tract parted with his right in the land to the public. The public authorities hold it for the uses proper for a street, to-wit: to pass over, and to use it as streets are usually used in towns and cities, to-wit, for drains, sewers, water-pipes, gas-pipes, etc., etc. And if the city directs it, the public or any private citizen injured may enforce the proper use.

As we have said, if the street be abandoned by the abandonment of the city, so that there is no use for streets and the whole becomes a farm, with no lot-owners to have rights, the street would, *prima facie*, revert to the owner of the rebutting land. Whether this last presumption is rebutted by the words of the deeds by which these lots passed out of the original dedicator, we do not say, as we have not the deeds before us. We should, however, be strongly inclined to hold that the *title passed* to the owners of the abutting lots, even

h the deeds were by metes and bounds, which by impli-
excluded the streets.

cases like this, of a sale of lots upon a street dedicated
e vendor of the lots, there is an element that does not
in the cases referred to by the counsel for the defendant
or, to-wit: 15 Johnson's R., 447; 10 Peters' R., 25; 13
rd's R., 155. That element is, that this street was one
inducements of the vendees to buy. The price of the
to the vendor was increased by his dedication of the
. Its precise width and the precise uses to which it
be put are material to the owner of the abutting lands,
ot to the original proprietor. Even its existence is a
r of which the original owner need not care, after he
rted with the other lots upon it. And we should re-
a very strict and precise description of lines in the orig-
deed, showing something more than a reservation by
ation, before we would hold the natural and legal pre-
ion that the present owners of the abutting lots are the
s of the soil of the street, so laid out and so dedicated,
rebutted.

have not thought it necessary to decide the other points
because, in our judgment, the case turns upon the
we have discussed, to-wit: the right of the plaintiff, or,
l, of anybody, to maintain ejectment for this land, un-
e circumstances as they appear in the record.

lgment reversed.

ON, ANDERSON & COMPANY, plaintiffs in error, *vs.* E. D. GRAHAM, administrator, defendant in error.

plaintiff is now a non-resident of the State is not, of itself, suffi-
to excuse the filing of the affidavit of taxes paid under the Act of
ber 18th, 1870; it must appear that he was a non-resident at the
ecting of the debt and has so continued, so that no taxes could
been due on the same to this State.

Relief Act of 1870. Taxation. Before Judge PARROTT. Dade Superior Court. May Term, 1871.

In March, 1861, Allison, Anderson & Company obtained a judgment against Derberry. The judgment became dormant and *scire facias* was issued against Derberry's administrator to revive it. No affidavit as to the payment of taxes on the debt was filed in the Clerk's office. Such an affidavit had been attached to the *fi. fa.;* and it was shown that at the time of the trial plaintiff did not reside in the State. Nothing else appearing, the Court dismissed the case, because the affidavit required by the Act of 1870 was not filed with the Clerk. This is assigned as error.

J. G. JACKAWAY; J. A. W. JOHNSON, by W. H. DABNEY, for plaintiffs in error.

E. D. GRAHAM, for defendant.

McCAY, Judge.

This Court has uniformly held that a debt due to a non-resident is not taxable by our laws, and that, in a suit on such a debt, no tax affidavit is required. But the mere fact that a plaintiff is now a non-resident does not make out that the debt sued on has not, since it was contracted, been taxable. *Prima facie*, the debt was made at the residence of the defendant. Or it may be that the plaintiff has been a resident. To allow the construction of the Act contended for by the plaintiff in error would be to permit any plaintiff to evade the law by moving out of the State or by transferring his claim to a non-resident. To excuse filing the affidavit it should appear affirmatively, by proper evidence, that the debt is not taxable. That does not appear in this record, and we therefore affirm the judgment.

MONTGOMERY, Judge, concurred but furnished no opinion.

WARNER, Chief Justice, dissenting.

The Act of 13th of October, 1870, *outlawing* plaintiffs from the Courts, and denying them the right to sue therein upon any debt or contract, or cause of action, made or implied before the 1st day of June, 1865, until they shall have made an affidavit that all legal taxes chargeable by law have been duly paid thereon, for each year prior to the passage of said Act, is, in my judgment, unconstitutional and void, for the reasons heretofore expressed in other cases. This Act of 1870 is part and parcel of a concocted scheme of *unconstitutional* legislative enactments, calculated to debauch and demoralize the people, and which has *culminated* in the wholesale plunder of the public funds and public property of the State. A corrupt tree cannot bring forth good fruit, and unconstitutional legislation, which tempts the people to indulge in the dangerous luxury of *dishonesty*, never did, and never will, produce a healthy state of public morals in any community, so long as it is encouraged and sanctioned by those in public authority. The sooner this *putrid carcass* of unconstitutional legislation shall be buried out of sight by the constitutional judgment of the Courts, the better it will be for all *honest* people, and for the honor and credit of the State. I therefore dissent from the judgment of the Court in this case.

JOHN G. LOTT, Guardian, plaintiff in error, *vs.* JOSEPH L. DYSART *et al.*, defendants in error.

Where, in a suit pending on a debt, dated before June 1, 1865, the plaintiff had filed the affidavit required by the Act of October 13, 1870, and on the trial failed to show that the taxes due upon the debt had been paid for a part of the time since the debt was contracted, but proposed in open Court, then and there, to pay into Court for the use of the State the taxes still due:

Held, That it was error in the Court to deny him the right so to pay the full amount of taxes due. Such a payment would have been a substan-

tial compliance with the Act of Octobor 13, 1870, and the plaintiff would have been entitled to a judgment on his debt.

2. Where a note was given for land, to an administrator, and he turned the note over as assets to the guardian of the sole heir-at-law, the maker thereof giving the guardian a new note, with the administrator as security, this was not such a novation of the original debt for the land as that the note is not still a debt contracted for the purchase of the land.

Relief Act of 1870. Tax. Novation. Before Judge PARROTT. Bartow Superior Court. September Term, 1871.

Martin Lott died intestate. Vincent administered upon his estate and sold Lott's land to Dysart, and took his note, with security, for the purchase-money. Dysart was still in possession of the land. Savannah Lott was Martin Lott's sole heir, and when Vincent settled with her he gave up Dysart's said note and took from him Dysart's other note, with Vincent as security, in lieu of the first note, and gave that to John G. Lott, Savannah Lott's guardian, as part of the estate. This note was made in 1860. Lott, guardian, sued upon this note and suit was pending when the Relief Act of 13th October, 1870, was passed. Plaintiff filed an affidavit as to the payment of taxes on the debt, as required by said Act, within the time required. On the trial, plaintiff proved the payment of taxes for each year since the making of the contract, except two years. To cover this deficiency, plaintiff proposed to deposit with the Clerk of the Court a sum of money, for the use of the State, sufficient to cover the tax of said two years.

These facts being before the jury, defendant's counsel contended that plaintiff could not recover because of the non-payment of taxes. Plaintiff's counsel rejoined that the suit was for purchase-money of land, of which defendant was still in possession. The Court ruled that the second note was such a novation as to take the case out of that exception to the Relief Act. Plaintiff's counsel stood also upon his offer to make said deposit with the Clerk to pay the taxes. But the

Court ruled that that would not cure the non-payment of taxes. The jury found that the taxes had not been paid, as required by said Relief Act, and the case was dismissed. Said rulings are assigned as error.

H. P. BELL, for plaintiff in error.

A. JOHNSON, for defendant.

McCAY, Judge.

1. As we have ruled very often this Act of October 13th, 1870, must, to be sustained at all, stand as an exercise of the power of the Legislature to enforce the payment, to the State, of the taxes legally due it. It is not for the benefit of the defendant. True, it works to his advantage, if the plaintiff fails to comply with it, as does the Act of Congress requiring notes, etc., to be stamped. But here the plaintiff had complied with that section of the Act requiring him to file his affidavit within the six months, and the only question before the jury was the right of the plaintiff to a verdict. This the Act says he shall not have, unless he makes it plainly appear to the jury that all legal taxes have been paid. He proposes to pay the tax into Court. Why should he not be permitted to do this? There is no dispute as to the amount. The face of the note determines that—and when paid into Court it is then for the benefit of the State. The State gets in this way its tax, the purpose of the law. The defendant is not hurt; it is none of his business. The refusal of the law to permit a judgment to go, is not for his benefit but to compel the plaintiff to do his duty, not to the defendant, but to the State. Were there any question as to the value of the note or debt, we should hesitate, since the proper officer to receive the return would be the revenue officers. But that question is not here. The Court is the State's guardian of its rights, and it may fairly be trusted to see to it that the money paid in goes to the proper custodian of it.

2. It would be pushing the law of novation very far to treat this change of papers as a novation. The original payee was only the agent of the minor, and sold the land as his agent. In turning over the debt to the guardian he is only performing the duties of his trust. It was originally payable to *one agent* of this minor; it is now made payable to another, the guardian. The change of payees was simply this, the substitution of one agent for another. In both cases the minor was the beneficiary. The debtor and creditor are the same in both cases. It is well settled that the taking a security, or change of one, is not a novation. This note was still for the land. We think, therefore, the Court was wrong in both these grounds, and reverse the judgment.

Judgment reversed.

WARNER, Chief Justice, concurring.

The majority of the Court hold in this case that, although the plaintiff failed to prove at the trial that the taxes due upon his debt had been regularly given in, and the tax paid for each year, as required by the Act of 1870, still, he might then, in open Court, pay the taxes due on his debt for *the use of the State*, and that such payment of taxes would be a substantial compliance with the provisions of the Act. Such a construction and interpretation of the Act of 1870 is not, in my judgment, authorized either by the words or the true intent and meaning of the Act. The Act of 1870, is entitled, "An Act to extend the lien of set-off and recoupment as against debts contracted before the first day of June, 1865, and to *deny to such debts the aid of the Courts until the taxes thereon have been paid.*" How, and in what manner do the enacting clauses of the Act declare that the taxes due on such debts shall be given in and paid, so as to entitle the plaintiff to the aid of the Courts to collect his debt? The first section of the Act declares, "That in all suits pending, or hereafter to be brought, in or before any Court of the State, founded upon any debt, or contract, or cause of

action, made or implied before the 1st day of June, 1865, or upon any other debt or contract in renewal thereof, it shall not be lawful for the plaintiff to have a verdict or judgment in his favor until he has made it clearly appear to the tribunal trying the same, that all legal taxes chargeable by law upon the same have been *duly paid for each year since the making or implying of said debt or contract.*" The second section of the Act declares, that, "In every suit now pending, or hereafter brought, it shall be the duty of the plaintiff, within six months after the passage of this Act, if the suit be pending, and at the filing of the writ if the suit be hereafter brought, to file with the Clerk of the Court of justice an affidavit, if the suit is founded on any debt or contract as described in section one, that all legal taxes chargeable by law upon such debts or contracts have been *duly paid,* or the income thereon *for each year* since the making of the same, and that he expects to prove the same upon the trial; and upon failure to file such affidavit as herein required, said suit shall, on motion, be dismissed." The third section of the Act declares that, "In suits upon such contracts, in every case, the *burden of proof* showing that the taxes *have been duly paid* shall be upon the party plaintiff, without plea by the defendant, and the defendant may, upon this point, cross-xeamine witnesses, introduce proof in denial and rebuttal to the plaintiff's proof, without plea." The fourth section of the Act declares that, "In every trial upon a suit fonnded upon any such debt or contract as described in this Act; provided, that said debt has been *regularly given in* for taxes, and *the taxes paid,* shall be a *condition precedent to a recovery on the same;* and in every such case, if the tribunal trying is not clearly satisfied that said taxes have been *duly given in and paid,* it shall so find and said suit shall be dismissed."

If this Act be a valid constitutional Act, as the majority of the Court hold it is, then it is quite clear to my mind that the taxes due on the debt must be proved at the trial on the

part of the plaintiff, to have been *duly* and *regularly given* by him and paid *for each year*, as a *condition precedent* to h right to recover the same in the Courts of the State. If th assumption of the majority of the Court be true, that the A was a *revenue measure*, to increase the revenues of the Sta by taxing this particular class of debts for that purpose, an that the payment of the tax due thereon at the trial by th plaintiff is a substantial compliance with the object an inten of the Act, then the Act is void, as being in violation of th Constitution of this State, which declares: "Nor shall any law or ordinance pass which refers to more than one subject-matter, or contains matter *different* from what is expressed in *the title thereof*." There is not one word in *the title* of this Act about *raising revenue for the State*, or going to show that such was the object and intention of the Act; but, on the contrary the title of the Act is, "to extend the lien of set-off and recoupment, as against debts contracted before the first day of June, 1865, and to deny to such debts the aid of the Courts until the taxes thereon have been paid." The plain intent of the Act was to deny to the holders of a particular specified class of debts *all remedy* for the collection thereof in the Courts of the State until the taxes thereon had been paid, whether the debts were solvent or *insolvent;* in other words, to practically *outlaw* that particular specified class of debts from the Courts, and the enacting clauses of the Act prescribe *the manner of doing it.* The discovery by our modern judicial Neckars that this Act was intended as a *revenue measure*, is a brilliant afterthought, not contemplated by the Legislature which enacted it. Their intention, as everybody knows, and which is apparent on the face of the Act itself, was to kill and destroy this particular class of debts by depriving the holders thereof of *all remedy* to enforce the collection of them in the Courts, under *the pretext* that the taxes due thereon had not been paid. This pretext of raising revenue is about as sound as the pretext of the Pope of Rome for selling indulgences to raise revenue.

But the Act is void, because it violates the tenth section of the first article of the Constitution of the United States, which declares that "no State shall pass any law impairing the obligation of contracts." The rule applicable to this question was clearly and explicitly stated by the Supreme Court of the United States in the case of Green *vs.* Biddle, 8 Wheaton's Reports, 1: "The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing *conditions* not expressed in the contract, or dispensing with the performance of those which are, however minute or apprrently immaterial in their effect upon the contract of the parties, impairs its obligation." This rule was recognized and adopted by this Court in *Winter vs. Jones*, 10 Georgia Reports, 190. In Van Hoffman *vs.* The City of Quincy, 4 Wallace's Reports, 550, the Supreme Court of the United States, in interpreting this clause of the Constitution, say, that "one of the tests that a contract has been impaired is, that *its value* has by legislation been *diminished*. It is not, by the Constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force." Again, the Court say in that case: "A *right* without a *remedy* is as if it were not, and for every beneficial purpose may be said not to exist. A different result would leave nothing of the contract but an abstract right of no practical value, and render the protection of the Constitution a *shadow* and a *delusion*. The ideas of validity and remedy are *inseparable*, and *both* are parts of the obligation which is guaranteed by the Constitution against invasion."

Does the Act of 1870 *invade* the legal right of the plaintiff to enforce his contract, as the same existed under the law at the time it was made? Does the Act of 1870 impose *conditions* upon the legal right of the plaintiff to enforce the ob-

ligation of the contract which did not exist under the la when the contract was made? Does the Act of 1870, whic requires the plaintiff to prove on the trial that his debt h been regularly given in for taxes, and the taxes paid, as a *con dition precedent* to his legal right of recovery of the sam in the Courts of the State, diminish the value of his del and contract?

Prior to the Act of 1870, and at the time plaintiff's del was contracted, the plaintiff was required, under the genera tax law of the State, to make a return of his taxable propert to the tax receiver of the county of his residence under oath and the entry of his returns of his taxable property on th tax-receiver's digests is *prima facie* evidence of his having taken such oath; and if false, he is guilty of false swearing and is liable to be indicted and punished therefor. If th plaintiff had failed to make a return of his taxable property in whole or in part, or had failed to affix a value to it, or ha returned any portion of it below its value, it is then made th duty of the tax-receiver to assess its value and the amount o taxation due thereon: Revised Code, secs. 923, 833, 834, 835 850. The law presumes that every citizen performs all hi legal and social duties, and that the tax-receiver of the county of the plaintiff's residence performed his *official* duty in as sessing the plaintiff's taxable property. The Act of 187 makes no exception as to *insolvent* debts which were con tracted before the 1st of June, 1865, but denies the aid o the Courts to *all debts* contracted prior to that date until th taxes thereon have been paid, whether such debts are *solven* or *insolvent*, whether such debts were liable to be given i for taxes, under the general law of the State, or not liable t be so given in. The Act of 1870 necessarily assumes tha the plaintiff swore *falsely* when he made his returns of hi taxable property to the tax-receiver, for each year, and im poses *a penalty* on him therefor, by denying him the aid o the Courts to obtain a judgment on his debt until the tax ha been given in and paid, whether his debt was *solvent* or *insol*

ı penalty different from that prescribed by the general
the State.

Act of 1870 also assumes that the tax-receiver of the
of the plaintiff's residence failed to perform his *offi-*
ty in assessing the plaintiff's taxable property under
ıeral law of the State.

onsidering the provisions of the Act of 1870, we are
ıs to say which exhibits the most cunning and crafti-
ıe subtle ingenuity with which the Act was drawn, to
d destroy *all remedy* on that class of debts specified in
he various *pretexts* which have been resorted to, from
time, by a majority of this Court to sustain the Act as
ue measure for the benefit of the State. If the legal
ion know what is the fixed and settled rule of con-
ɔn to be given to that Act by the decisions of a major-
his Court, it is more than I profess to know. I have
bt, however, that the Act of 1870 *invades* the legal obli-
of the plaintiff's contract and his legal right to enforce
ıe same existed under the law at the time the contract
ıde; that it imposes *conditions* upon the legal right of
ıintiff to enforce the obligation of that contract, which
t exist under the law when the contract was made; and
e provision of the Act which requires the plaintiff to
ıt the trial that his debt has been regularly given in
es and the taxes paid, as a condition precedent to his
ght of recovery thereon in the Courts of the State,
hes the value of his debt and contract, and imposes a
upon him different from that prescribed by the gen-
w of the State, at the time the contract was made. I
re concur in the judgment of reversal in this case, not
ground that the plaintiff had the right to pay the tax
ime of trial, under the provisions of the Act, as *reve-*
the State, but on the ground that the Act itself is in
ɔn of the tenth section of the first article of the Con-
n of the United States, and is *null and void.*

MARY A. REDWINE, administratrix, plaintiff in error, *vs.* W. D. HANCOCK *et al.*, defendants in error.

In a suit by an administratrix on a debt contracted before June, 1865, where it is made to appear that there are no debts, and that the persons entitled to the estate are a widow and minor children, the case is within section fourteen of the Act of October 13, 1870, and no proof of payment of taxes is required.

Relief Act of 1870. Tax. Widows. Minors. Tried before Judge PARROTT. Whitfield Superior Court. April Term, 1871.

Mrs. Redwine, as administratrix of her husband, filed a bill to collect a note due to her husband, and made prior to June, 1865, by Hancock *et al.*, and to enforce a vendor's lien for its amount. She filed no affidavit as to the payment of taxes, and for want of it defendant's counsel moved to dismiss the cause. Her counsel proposed to prove that the estate owed nothing, and that the whole of the debt belonged exclusively to her and her children, and that she was a widow and they were minors, and contended that thus they would bring the case within that class to which said Act was, by its terms not to apply. Section fourteen of said Act is: "nothing in this Act shall be so construed as to effect any claim due any widow or minor contracted prior to June 1st, 1865," etc. The Court dismissed the cause, and that is assigned as error.

W. K. MOORE, for plaintiff in error.

MCCUTCHEN & SHUMATE, for defendants.

MCCAY, Judge.

The administratrix holds this debt as trustee for the widow and children. They are the true equitable owners of it and nobody else. It can rarely, if ever, happen that a minor is the legal owner of a debt. Almost invariably some person has it in trust for the minor's use, and if the exception in the

Act of 1870, is only to apply to cases where the minor is the legal owner it might as well not have been there. We have given this Act a liberal construction. It puts a new duty upon suitors, unknown previously, and it ought not to be extended beyond its legitimate scope. We think, too, the exceptions ought to be liberally construed. This note belonging, as the proof shows, equitably to a widow and minor children, it comes within one of the exceptions expressly provided for in the Act of October 13th, 1870. We think, therefore, the judgment was wrong.

DANIEL S. PRINTUP, agent, plaintiff in error, *vs.* THE CHEROKEE RAILROAD COMPANY, defendant in error.

1. The State of Georgia cannot be made a party defendant in a suit, in any Court, except by consent of the proper authorities; nor can this be done so as to affect the rights of the State by making the agent of the State, appointed by its authorities, a party; and any judgment against such agent cannot affect the rights of the State, or affect its position.
2. A writ of error brought by one, alleging error made against him as agent for the State, will not be dismissed because, since the suing out of the writ of error, and before the hearing here, he was removed from such agency. (R. See end of Report.)

Injunction. Receiver. Practice Supreme Court. Before Judge PARROTT. Bartow county. Chambers. January, 1872.

Early in December, 1871, said railroad company filed a bill, averring that Henry Clews & Company claimed to be its creditor for a large amount, because they held bonds purporting to be issued by it and indorsed by the State of Georgia; that, for reasons given, said bonds were void, as to said company and said State; that various other named parties were its creditors, and some of them had judgments against it and would sell its property. To avoid a multiplicity of

suits, for the reasons set out in said bill, it prayed a marshalling of its assets, and that, *ad interim*, a Receiver take possession of the road, etc., and that all the creditors be enjoined from proceeding, except as defendants to this bill. The Chancellor ordered the defendants to shew cause, on the 30th of December, 1871, why said prayer should not be granted.

On that day, Printup appeared and stated that he was agent of the State, and asked for a postponement of the hearing to another day. The State was not a party to the bill, but, by consent, the hearing was postponed till the first Monday in January, 1872. On that day, Printup was not present. Then and there complainant amended their bill by averments to the following effect:

Henry Clews & Company, said holders of the pretended bonds of the company, indorsed by the State, (which bonds are void, for the reasons aforesaid,) falsely represented to Conley, then Governor of Georgia, that said State was bound on said bonds, and that the interest due on them was unpaid, and prayed that he, as Governor, would seize and hold said road and its property as indemnity for the liability of said State, according to the provisions of the Act under which said indorsement was made. Thereupon, on the 28th of December, 1871, Conley, as Governor, did issue his proclamation, ordering the seizure thereof by Daniel Printup, as agent of the State, and under said order, Printup was about to take possession of the same. In fact, Printup is not the agent of the State, but is the attorney of Henry Clews & Company, and this proclamation, etc., is but a trick to enable Henry Clews & Company to force the payment of said void bonds. And they prayed injunction against Printup. No service of this amendment was made. The case was then and there heard, without notice to Printup, and the injunction was granted, as prayed for.

Printup, as agent for the State, says the Chancellor erred in enjoining him, as agent of the State, especially in the face of the want of notice of the amendment aforesaid.

(When the cause was called here, defendant's counsel moved to dismiss the case, because, since the filing of the bill of exceptions, Printup had been removed from his agency The motion was overruled.)

PRINTUP & FOUCHE, by O. A. LOCHRANE, for plaintiff in error: 8 Ga. R., 210, and 43d, 466; Acts of 1869, 152–3.

A. JOHNSON; W. T. WOFFORD; WILLIAM H. DABNEY; C. PEEPLES, for defendants.

McCAY, Judge.

We do not undertake to say whether the State had or had not any right to take possession of this road. All we decide is, that the State cannot be made a party to this suit against or without her consent, and this cannot be gotten around by making her agent a party. If the State was in possession, it is not in the power of the judiciary to oust her, since the State, as such, cannot be impleaded in her own Courts, except by express consent of the proper authorities.

If, therefore, there be anything in the judgment of the Court affecting the interest or the *status* of the State as to the property covered by the bill, (and we think there is,) the judgment is, so far, reversed.

Judgment reversed.

A. BOOTH *et al.*, plaintiffs in error, *vs.* A. M. BUTTS, administrator, defendant in error.

BY TWO JUDGES.)—When, on the trial of a suit founded on a debt contracted before June, 1865, in which the affidavit required by the Act of 18th of October, 1870, was duly filed, the defendant, on the calling of the cause and the announcement that both parties were ready, moved to dismiss the suit because the plaintiff had not sustained the affidavit, and the Court overruled the motion, and subsequently, on the offering

of the note in evidence, objected to the evidence on the same ground, and on the plaintiff closing his case, made no motion to non-suit, and after verdict for the plaintiff, made no motion for a new trial, but filed his bill of exceptions to the ruling of the Court in the premises:

Held, That the Judge committed no error to justify this Court in setting aside the verdict. 5th March, 1872.

Practice under Relief Act of 1870. Before Judge JOHNSON. Marion Superior Court. October Term, 1871.

The necessary facts are in the head-notes.

E. H. WORRELL, CAREY J. THORNTON, by JOHN PEABODY, for plaintiff in error.

BLANFORD & THORNTON, for defendant.

McCAY, Judge.

The bill of exceptions in this case is founded on a misapprehension of the Act of October 13th, 1870. There is no fault in the record of the Judge. The motion to dismiss the suit on the announcement that both parties were ready, was properly refused. The question of the payment of taxes was, in the *status* of the cause, for the jury to decide under the evidence. So, the objection to the note was not well taken; it properly went to the jury as a part of the case. Had the defendant moved a non-suit, in the closing of the plaintiff's case, his motion would, doubtless, have been sustained, or had he, after the verdict, made a motion for a new trial it would probably have been granted. But this Court can only review decisions of the *Judge*. We have no power over the verdict of a jury directly. It can only come in review here by notice of some decision of the Court upon it.

Judgment affirmed.

JOHN THOMPSON, plaintiff in error, *vs.* J. B. FISCHESSER AND THOMAS J. HEARD, garnishee, defendants in error.

When a garnishee does not admit in his answer that he is *indebted* to the defendant, or that he had any effects in his hands *belonging to him*, but states the fact that a sum of money was placed in his hands to indemnify him as security on a bail bond for the defendant, without stating who placed the money in his hands, and that he had been sued by a third party who claimed the money:

Held, That it was not error in the Court to refuse to allow the plaintiff to enter up a judgment against the garnishee upon the statement of facts disclosed in his answer. If the plaintiff had thought proper to have done so, he could have traversed the answer of the garnishee, and have shown that the money in his hands was the property of the defendant.

Garnishment. Before Judge ANDREWS. Elbert Superior Court. March Adjourned Term, 1871.

For the facts of this case, see the decision.

ROBERT TOOMBS, for plaintiff in error.

J. D. MATHEWS, for defendants.

WARNER, Chief Justice.

In this case Heard was served with a summons of garnishment, at the instance of Thompson, a creditor of Fischesser, requiring him to answer what he was indebted to Fischesser, or what effects he had in his hands belonging to him. Heard, the garnishee, answered that he had in his hands $500 in gold, which was placed in his hands to indemnify him against any loss or damage he might sustain in going the security of Fischesser in a bail case, at the instance of Thompson, against Fischesser; that before he was exonerated and relieved from his securityship he was served with the summons of garnishment, that since the service of the garnishment he had been sued by one Margaret Fischesser for the said $500 in gold, which she claims to be her property, which suit is now pend-

ing in Elbert Superior Court; that the bail process against Fischesser had been dismissed.

Upon this answer of the garnishee the plaintiff moved the Court to enter up judgment for the $500 in gold, which motion was refused, and the plaintiff excepted. The garnishee does not admit in his answer that he is *indebted* to Fischesser, or that he had any effects in his hands *belonging to him*, but states the fact that the money was placed in his hands to indemnify him as security for Fischesser on his bail bond, without stating who placed the money in his hands. In our judgment it was not error in the Court below in refusing to order a judgment to be entered against the garnishee on the statement of facts contained in his answer. If the plaintiff had thought proper to do so, he could have traversed the answer of the garnishee, and have shown that the money in his hands was *the property of Fischesser*.

Let the judgment of the Court below be affirmed.

THE MACON AND AUGUSTA RAILROAD COMPANY, plaintiff in error, *vs.* FRANK L. LITTLE, executor, defendant in error.

JACKSON B. JOHNSON, administrator, plaintiff in error, *vs.* R. STOKES SAYRE *et al.*, defendants in error.

1. That clause of the third paragraph of the first section of Article II. of the Constitution of Georgia, which provides that "No session of the General Assembly, after the second under this Constitution, shall continue longer than forty days, unless prolonged by a vote of two-thirds of each branch thereof," applies only to the General Assembly which was to meet after the State government had been fully reconstructed under the so-called Reconstruction Acts of Congress, not to the Legislature of the provisional government organized under those Acts.
2. The Supreme Court of the United States have said, in White *vs.* Hart *et al.*, *infra*, "the action of Congress upon the subject (the reconstruction measures) cannot be inquired into. The case is clearly one in

which the judicial is bound to follow the action of the political department of the government, and is concluded by it." While compelled to accept this dogma as law, and as perhaps true, in a limited degree, so far as facts accomplished are concerned, as a general proposition I dissent from and protest against it.

. Under the recent decision of the Supreme Court of the United States in the case of William White *vs.* John R. Hart and William D. Davis, decided December Term, 1871, we are compelled to hold, that the reconstructed provisional government of Georgia did not expire before June 12th, 1870, when Congress enacted that the State of Georgia having complied with the Reconstruction Acts, and the fourteenth and fifteenth amendments to the Constitution of the United States having been ratified in good faith by a legal Legislature of said State, it is hereby declared that the State of Georgia is entitled to representation in the Congress of the United States." Upon the admission of her Senators and Representatives under that Act, says the Court, "the condonation by the national government became complete." The conclusion to our minds is inevitable, that up to the passage of that Act, at least, the provisional government provided for by the Act of March 2d, 1867, still existed.

. It follows that the session of the Legislature of 1870, which passed the Act of October 13th, of that year, was not a session of the General Assembly, after the second under the Constitution, in the sense in which the Convention of 1868 used these words. Hence the Act under review is not invalid because passed by the Legislature more than forty days after the commencement of its session.

. It is at least doubtful whether the first four sections of the Relief Act of October 13th, 1870, prospective in their operations, as sound rules of construction require them to be understood, so far impair the remedy of contracts made prior to June, 1865, as to be unconstitutional under the tenth section of the first Article of the Constitution of the United States. It is, therefore, the duty of the Court to refuse to declare them unconstitutional.

. The first four sections of the Relief Act of October 13th, 1870, must be read in the light of the title to that Act, and in so far as they are not variant from it, they do not violate the fifth paragraph of the fourth section of Article three of the Constitution of Georgia, and to that extent the Court should give them effect. Therefore, in all suits pending at the time of the passage of the Act, for debts founded on contracts made prior to June, 1865, the taxes must have been paid, and the affidavit filed within six months after the Act passed; and in all suits commenced after its passage, at the time of filing the writ, on pain of having the case dismissed on failure to do so.

. If Congress or a State Legislature pass a law, within the general scope of their constitutional power, the Courts cannot pronounce it void

merely because, in their judgment, it is contrary to the principles of natural justice: Calder *vs.* Bull, 3 Dallas, 399.

8. A bill of interpleader being filed by an administrator against the creditors of the estate represented by him, whose claims are antagonistic, and some of the claims being founded on contracts entered into before June, 1865, it is not necessary for creditors holding such claims to file an affidavit of the payment of taxes with their answers, their claims having been brought into Court by the administrator and not by themselves. On the trial of the case, however, they should make it clearly appear that the taxes have been paid to entitle them to a decree for the payment of the claims.
9. Subscriptions to the stock of the Macon and Augusta Railroad Company, made before June, 1865, stand upon the same footing with other debts contracted before that date; and in suits against the subscribers for the amount of their subscription, the payment of taxes and the filing of the affidavit, as required by the Relief Act of 1870, is necessary. WARNER, Chief Justice, dissenting.

Constitutional Law. Reconstruction complete. Expiration of Provisional Government. Relief Act of 1870. Obligations of contracts. Tax-affidavit. Tried before Judge ANDREWS. Hancock Superior Court. October Term, 1871.

The first of these cases was an action of assumpsit by the Macon and Augusta Railroad Company against Frank L. Little, as executor upon the estate of T. H. Andas, deceased, for a subscription to the capital stock of said company, made by said Andas when in life, at some time prior to June 1st, 1865, the date not appearing upon the record. When said cause was called for trial, a motion was made to dismiss the same, because no affidavit had been filed of payment of taxes under the Relief Act of 1870, which motion was sustained by the Court, the case dismissed, and plaintiff excepted.

The second case arose upon a bill filed by Jackson B. Johnson, as administrator of James Thomas, deceased, *de bonis non, cum testamento annexo, vs.* R. Stokes Sayre *et al.*, asking direction as to whether he should pay anything on such debts as appeared to have arisen prior to June 1st, 1865, unless accompanied by affidavits of the payment of the taxes. The said administrator moved to dismiss said claims when

presented, upon the ground that no tax-affidavit had been filed, which motion was overruled by the Court upon the ground that said claims were not in suit, to which ruling complainant excepted.

B. H. Hill, Esq., and Henry L. Benning, Esq., having appeared in Court and stated that they represented interests which would be materially affected by the decision of the principles involved in this case, were allowed to be heard.

R. TOOMBS; C. W. DUBOSE; LINTON STEPHENS, against the constitutionality of the Relief Act of 1870.

B. H. HILL; HENRY L. BENNING; FRANK L. LITTLE, *contra.*

MONTGOMERY, Judge.

In these cases the Act of October 13th, 1870, commonly known as the Relief Act, is attacked, mainly on two grounds: 1st. It is said to be invalid because the session of the Legislature at which it was passed was not a session of the General Assembly, after the second under the Constitution, and that, at the time of the passage of the Act, that Legislature had been in session more than forty days without having prolonged the session by a vote of two-thirds of each House. 2d. That the Act impaired the obligation of all contracts made prior to June 1865, and is, therefore, repugnant to the tenth section of Article I. of the Constitution of the United States. It is impossible to consider intelligently the first question made without reviewing the so-called Reconstruction Acts of Congress, and ascertaining to what extent Courts are now compelled to recognize the *results* of those unconstitutional and revolutionary measures as facts accomplished, and which are now beyond the remedial power of the Courts.

1. Before entering upon that discussion, it becomes necessary to fix, with some degree of precision, the import of that clause in our State Constitution, which says "no session of

the General Assembly, after the second under this Constitution, shall continue longer than forty days, unless prolonged by a vote of two-thirds of each branch thereof." Does this mean no session of the General Assembly, after the second session under this Constitution, or no session of the General Assmbly after the second General Assembly under the Constitution? If "General Assembly" is to have the same relative meaning under the Constitution of Georgia that "Congress" is understood to have under the United States Constitution, then the latter is perhaps the correct reading.

The Congresses of the United States are regularly numbered, and each has two regular sessions. The last clause of the sentence which we are considering, would seem to strengthen this view, "unless prolonged by a vote of two-thirds of each branch thereof." Does this mean unless prolonged by a vote of two-thirds of each branch of the session? The question is debatable, it is not necessary to decide it. It may be dismissed with the general remark that, our General Assemblies are elected every two years, and organized at their first session for the entire period for which they are elected, but each holds a regular session annually. If the reading here intimated, as possibly the proper one be correct, this disposes of the question at once. No one pretends that the Legislature of 1870 was a General Assembly after the second under the Constitution of 1868. But suppose the word "session" is to be understood after the word second, in the clause under review, what, then, is meant by the words "under this Constitution"? A brief retrospect at the anomalous circumstances by which the Convention of 1868 was surrounded, explains the meaning to my mind, at least, very clearly.

By the Act of March 2d, 1867, the first of the reconstruction measures, five conditions precedent were required to be complied with before military rule should cease in the States "lately in rebellion." These have been correctly stated to be, 1st, The formation of a State Constitution; 2d, The ap-

proval of that Constitution by Congress; 3d, The ratification of the fourteenth amendment; 4th, The declaration by Congress that the State is entitled to representation; and, 5th, The final Act of recognition—the admission of Senators and Representatives, on their taking the oath prescribed by law. Section sixth of the Act then provides, "that until the people of the said rebel States shall by law be admitted to representation to the Congress of the United States, the civil governments that may exist therein shall be deemed provisional only, and shall be in all respects subject to the paramount authority of the United States any time to abolish, modify, control and supersede the same."

Article XI., sections nine and eleven of the Constitution of Georgia, fully recognizes the provisional nature of the government then forming, and that it was to remain so until otherwise declared by Congress. It is also matter of history that the Convention which framed that Constitution assembled under, and recognized the validity of the Act of March 2d, 1867. It is further matter of history that our laws were well nigh in a state of chaos, resulting from the disastrous termination of the war, and the Reconstruction Acts of Congress. Such being the condition of things during the session of the Convention of 1868, is it not obvious that they meant to make the first two sessions of the General Assembly (so to read the Constitution) of indefinite duration, in order to give them full time to bring order out of chaos, and to reconcile an unwilling people to a government forced upon them by the bayonet? It so seems to me. But will it be said that they meant that a Provisional Legislature should undertake this arduous work? Even supposing they had been permitted to finish such a work, by the very terms of the Act under which the new government was called into being, all their labor might have been lost by having the system established by them abolished, modified, controlled or superseded by the order of a military commander, or by Act of Congress. Can it be supposed that the Convention had so

little foresight as this? With great deference to adverse opinions, it seems to me impossible. When that part of the Constitution now under review was first reported to the Convention it read as follows: "The first meeting of the General Assembly shall be within ..... days after the adjournment of this Convention, etc. * * * No session of the General Assembly, *after the first above mentioned*, shall continue longer than forty days, etc.: Journal of Convention of 1868, page 122. It was amended by striking out the words "first above mentioned" and inserting "second under this Constitution:" *Ibid.*, page 318. This, perhaps, militates against the reading first suggested in this opinion. But it indicates much more strongly that the Convention contemplated meetings of the General Assembly held under some other authority than that of the Constitution.

I conclude, therefore, that the language used in the Constitution contemplated that there would be one or more sessions of the General Assembly under the Reconstruction Acts and the military commander, provisional in their character, and that the sessions of the General Assembly to be held "under this Constitution" were the sessions to be held after the iron hand of a hostile and despotic government had been withdrawn from the control of the State government. But it is said that the government was not provisional after the withdrawal of the military control over the State, in July, 1868, by General Orders, No. 55, Adjutant General's office, and General Orders, No. 103, Headquarters Third Military District, July 22d, 1868, issued by General Meade, and that this Court has decided that the State had fully complied with the Reconstruction Acts on July 21st, 1868, in Foster *vs.* Daniels, 39 Georgia, 39. The question in that case was, when did the County Courts cease, which depended upon, when did the Constitution go into operation. If, as I think I have shown, the Constitution went into *provisional* operation, before it became permanent, by permission of Congress, Foster *vs.* Daniels cannot affect the question

now before the Court. But, unfortunately, neither the Military Department nor the Supreme Court of Georgia was the proper judge of this matter. General Terry, General Meade's successor, thought the State had not, and recommended that the President should countermand those orders. It was done. He further recommended that members of the Legislature, elected under General Meade, should be called together as a Provisional Legislature. Congress, by Act of December 22, 1869, provided for so doing, thus determining the question that the government of Georgia was still provisional, under Act of March 2, 1867; otherwise, they could have had no warrant, under their own theory, for interfering with the domestic government of a State. It may be added that the Legislature of 1870 was not elected, assembled, organized or sworn in under the Constitution. Its members were elected before the adoption of the Constitution. It was assembled under Act of Congress, of December 22, 1869. It was organized by a military commander, who rejected whom he pleased and seated whom he pleased. It was sworn in by a judicial officer of the United States, took oaths not contemplated by the Constitution, and did not take the oath prescribed by the Constitution, before a State officer, as required by the Code. It undertook to act under the Constitution, so far as permitted by military authority, but no further, and was recognized only as a provisional body by the United States commander: House Journals, 1870, page 53. His word, and that of Congress, was that of the master to the slave; to hear was to obey.

2. Finally the Supreme Court of the United States, in the late case of White *vs.* Hart, have said, "The action of Congress upon the subject (of the Reconstruction measures) cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it." While compelled to receive this dogma as law, and as perhaps *now* true, so far as *de facto* governments have been established

under those Acts, I can but lament that a co-ordinate department of the government should fail so far in its highest duty—the protection of the property, liberty and lives of the people from the unconstitutional and revolutionary encroachments of the two other departments. I differ from, and protest against, a proposition so degrading in the broad sense in which it is enunciated.

3. Under that decision we are compelled to hold that the reconstructed provisional government of Georgia did not expire before June 12th, 1870, when Congress enacted "that the State of Georgia, having complied with the Reconstruction Acts, and the fourteenth and fifteenth amendments to the Constitution of the United States, having been ratified in good faith by a legal Legislature of said State, it is hereby declared that the State of Georgia is entitled to representation in the Congress of the United States." When her Senators and Representatives were admitted under that Act, says the Court, "the condonation by the national government became complete."

The conclusion to our minds is inevitable, that up to the passage of that Act, at least, the provisional government, organized under the Act of March 2d, 1867, still existed.

4. It follows that the session of the Legislature of 1870, which passed the Act of October 13th, of that year, was not a session of the General Assembly after the second, under the Constitution of Georgia, in the sense in which those words were used by the Convention of 1868. Hence the Act under review is not invalid because passed by the Legislature more than forty days after the commencement of its session.

Counsel on the one side have earnestly invoked the Court to look to the law alone, and decide the momentous questions raised by the record, in the cases under consideration, without reference to the consequences which may result from a decision declaring these Acts unconstitutional, insisting that this Court have nothing to do with any consequences which may result. On the other hand, it is urged that the gravest

consequences will follow a decision declaring the Acts unconstitutional, which the Court should not ignore; those consequences, it is said, being no less than the overthrow of the entire State government—executive, legislative and judicial departments. That such consequences *might* possibly result, none can deny who are acquainted with our recent history, and recollect the pretexts that have been seized upon by an unfriendly paramount power to overthrow our State government more than once.

Without conceding the rule insisted on by counsel, attacking the constitutionality of the Acts in question, I have not found it necessary to resort to the *argumentum ab inconvenienti*, though no case has ever presented a stronger reason for the application of it than the present, had I doubt upon the question. The reasoning is conclusive to my mind that the objection is unsound, without that argument.

I will add that the point under discussion comes fully within the principles laid down by this Court, Judge Warner delivering the unanimous opinion of the Court, in Solomon *vs.* The Commissioners of Cartersville, 41 Georgia, 157. The question then under consideration was the power of the Governor to approve an Act after the Legislature had adjourned. In that case, the approval was more than five days after the adjournment. The eminent jurist delivering the opinion, says: "If this was an original question, independent of any construction heretofore given by the executive department of the State government, this Court would be inclined to hold that the Governor, under the Constitution, could not approve and sign any bill after the adjournment of the General Assembly; but, upon looking into the past history of our legislation, we find it has been the practice for many years for the Governor to take five days after the adjournment of the General Assembly for the revision of bills, and to sign them within that time, but not afterwards; that a large number of the most important Acts now upon the statute books of the State have been so approved and signed. This usage

and practice of the executive department of the State government should not now be disturbed or set aside." It will be observed that Judge Warner bases his refusal to declare invalid Acts approved within five days from the adjournment of the Legislature, upon two grounds: first, the interpretation placed upon the Constitution "by the executive department of the State government:" secondly, that "a large number of the most important acts now upon the statute books of the State have been so approved and signed," to declare which unconstitutional must create great confusion, is the necessary inference, and be attended by very serious consequences; though it will be observed that neither the Judge delivering the opinion, nor any member of the Court, entertained any such doubt as would justify a resort to the *argumentum ab inconvenienti* upon strict legal principles.

Two principles, applicable to the present case, are deducible from Solomon *vs.* the Commissioners of Cartersville—first, a decision by a co-ordinate department of government, upon a question legitimately within its sphere, will have great weight with this Court in sustaining the constitutionality of an Act attacked as void, because not properly acted upon by that very department. Secondly, the *argumentum ab inconvenienti* will be strained to its utmost limits to sustain Acts of the Legislature, to declare which void might produce very serious consequences to the State. The principles laid down in that case apply with much greater force to the present; here we have the decision of the *three* departments of the State government that the body of Acts passed in 1870 are valid, to-wit: the legislative, the executive and the decision of this Court in Gormley *vs.* Taylor, decided September 5th, 1871, besides a concurrence in their validity by a subsequent executive and Legislature, which has amended, repealed and refused to repeal, many of the Acts of 1870—the repeal of the one now under review being expressly attempted, and failing of success. Again, the consequences which might have resulted from declaring all Acts signed by the

vernor after the adjournment of the Legislature invalid, k into insignificance when compared with those which ght follow a decision that the entire body of laws of 1870 uld be stricken from the statute book. The power of a irt to destroy is tremendous—it cannot rebuild. It should, refore, approach with great circumspection and caution investigation of a question in which it is called upon to ep out of existence, at one blow, more than a hundred s.

It is submitted that if the laws of 1870 are unconstitual for the reason alleged, much more are the Acts of 1871 oxious to the same objection. The Legislature which sed the latter, came into existence under one of the former. d the Acts of 1871 were submitted to a person, as Gov-or, for his approval, who, by concession of counsel claim-; the laws of 1870 to be unconstitutional, was not the legal vernor of the State. Again, if Judge Warner lays down correct rule, in his dissenting opinion in Gormley *vs.* Tay-; no law passed by the Legislature at its approaching ses-n in July can be valid, unless the adjournment in January was by joint resolution passed by two-thirds of each use. I have not the Journals at hand, but my recollec-n is, that the resolution of adjournment was passed by a jority vote only.*

Judge Warner says, in that decision, "by reference to the urnals of the General Assembly, as published, which this urt is bound to recognize under the provisions of the 3762d tion of the Code, the third session of the General Assem-, under the Constitution of 1868, was commenced on the th day of January, 1870." [The day they assembled under proclamation of the Governor, issued in obedience to the t of Congress of December 22, 1869.] "The Act in ques-n was dated on the 28th day of October, 1870, more than

ors—Since writing the text, I have ascertained that the adjournment in Jan-, 1872, to July next, was by a majority vote only, and not in accordance with le III., section 4, paragraph 9 of the Constitution, providing that where a vote o-thirds is required, the yeas and nays shall be entered on the Journal.

forty days after the commencement of the third session of the General Assembly under the Constitution of 1868. After a careful examination of the Journals of the General Assembly, it nowhere appears, therefore, that the time was prolonged by a two-thirds vote." If, then, the Journals of the General Assembly, which sat in January, 1872, do not show that the adjournment over to July next was carried by a two-thirds vote, no law passed by that Legislature at its approaching session in July can be valid. It would be difficult to imagine a case where the reasoning admits of being so closely pressed to the *reductio ad absurdum*. It has been well remarked by counsel that society abhors anarchy. The logical result of the argument against the constitutionality of the Acts under review seems to me to be anarchy.

5. The next objection is, that the first four sections of the Act of October 13, 1870, impair the obligation of all contracts made prior to June, 1865, and are therefore void, under the tenth section of Article one of the United States Constitution. It is also said they impose a penalty for past delinquencies, and are, therefore, *ex post facto* in their operation. The argument is, that the first section forbids the plaintiff to have a verdict or judgment in his favor until he has made it clearly appear that all legal taxes upon the debt "have been duly paid for each year since the making or implying of the debt," etc., and that the second section requires him to file an affidavit that all legal taxes "have been duly paid" "for each year since the making of the debt," etc., and that this affixes an *ex post facto* penalty for non-payment of taxes, besides impairing the obligation of the contract, the words, "duly paid for each year," meaning paid each year as they fell due. If the Legislature intended this, they have signally failed to express such intention in the language used. Our laws provide for the payment of back-taxes at any time, and taxes due for many years may now be paid "for each year," and when paid, they are "duly," or properly, paid under the law. Doubtless many legislators

ay have voted for the Act under the impression that it re-
uired a party plaintiff to swear that he had each year paid
e taxes on his debt as they fell due. Indeed, the Act
ems to have been skillfully drawn with a view of creating
ch an impression upon the minds of a sufficient number of
lvocates of relief to insure its passage. It is equally clear
at the language used does not require him to do any such
ing, but gives him six months after the passage of the Act
ithin which to pay his taxes and file his affidavit, if his
it was pending at the time of its passage, and up to the
mmencement of his suit, if it is brought after the passage
f the Act. Hence, the operation of the three first sections
re not retroactive.

But it is said that the fourth section requires, as a condition
recedent to a recovery on the debt, that the Court shall be
learly satisfied that "said debt has been regularly given in
or taxes and the taxes paid," otherwise "said suit shall be
ismissed." Suppose it be conceded that this section is un-
onstitutional, it does not help the case; the ground is fully
overed by the first three sections, and the plaintiff must still
ay his taxes, file his affidavit, and make the proof required
y section third. But does "regularly given in for taxes"
ean given in each year for taxes? "Regularly given in"
rely means given in according to rule; law is a rule of ac-
on. Then, according to law, what is the law applicable to
ch a case? Revised Code, section 866, provides, "Receiv-
s and collectors are required to receive the returns, and to
llect the taxes thereon for former years, when any person
county are in default, which taxes shall be assessed
cording to the law in force at the time the default occur-
d;" and this, especially when taken in connection with the
llowing section, would seem to relieve the defaulter, when
voluntarily goes forward and returns his back-taxes, from
e penalty of double taxation, imposed in the event the
ceiver discovers the property withheld from taxation and

returns the owner as a defaulter, under section 839 of the Code.

I think I have shown that the first four sections of the Relief Act of 1870 are prospective in their operation. Do they impair the obligation of a contract? This question is more delicate. It is not to be doubted that the States may pass laws affecting, to a certain extent, the *remedies* on contracts. To *what* extent the Supreme Court of the United States, at least, have left undetermined: Von Hoffman vs. City of Quincy, 4 Wallace, 553. In that case the Court says, "No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances." Again, upon the same page, the Court says it is only that "legislation which affects the contract directly, and not incidentally or only by consequence," which is void. Once more it says, "it is also settled that the laws which subsist at the time and place of the making of the contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms:" Page 550. Now, then, how far does the Act in question affect the remedy? It requires the taxes, which the plaintiff has been derelict in paying, to be first paid before he shall be entitled to his remedy. The payment of these taxes was required by the law at the time the contract was entered into. The Legislature have the undoubted right to enforce the payment of taxes; the Act is but a mode of doing that. True, *the indirect* effect of the Act is to induce persons who have long neglected their duty to the State, to abandon their claims rather than pay the taxes, and no doubt the Legislature foresaw this consequence and availed themselves of the method to afford relief to a ruined and bankrupt people. Those who have defied the law and allowed six months to pass, when they had suits pending, without paying the taxes, may have lost their claims, not by

provision of this Act, however. So far as it is concerned, may now pay their taxes and re-commence their suits. it is said the Limitation Act of March, 1869, will now those claims, and thus the entire remedy is destroyed. ld not, then, the constitutional objection come better i that Act is pleaded? Or, if not, has the plaintiff any o blame but himself?

uch has been said of the dishonesty of the Act, and yet xcuse is offered for the refusal of the plaintiffs to render the State her dues. Because she has been indulgent to e defaulters in not hitherto forcing them to pay their just ortion of the burdens of government, they now claim right to collect their debts, *including the proportion of i due to the State*, without paying the State's own money her treasury! They claim the right to force *their* debt- to pay the uttermost farthing, and yet have gladly availed nselves of the indulgence on the part of the State to nselves, and still claim that indulgence as a right. The ble of the unmerciful servant here finds its apt illustra-

he case of Livingston *et al. vs.* Moore, 7 Peters, 469, s some analogy to the present one. There the plaintiffs, eirs of John Nicholson, sued the defendant in ejectment, ennsylvania. Nicholson had been Comptroller General 'ennsylvania, and had resigned, owing the State a large int. After his appointment a statute of the State was id giving the State a lien upon his property for the int due by him. The State then sued him and he con- d judgment. After that another statute was passed, inting commissioners to take possession of his lands, (of h he had a large amount,) and report the condition of ccounts to the Governor, who was, by the provisions of tatute, to issue an order to the commissioners to sell the

This was done, and defendant bought. His title was ked by the plaintiffs on the ground that the statutes of tate above mentioned were unconstitutional, as impair-

ing the obligation of three contracts existing between the State and Nicholson: first, his appointment as Comptroller General under laws defining his liability at the time; secondly, the State's grant of the land to him; thirdly, the acceptance by the State of the confession of judgment. The Court says, "The body politic has its claims upon the constituted authorities as well as individuals; and if the plaintiffs' course of reasoning could be permitted to prevail, it would then follow that provision might be made for collecting the debts of every one else, but those of the State must go unpaid, whenever legislative aid became necessary to both. This would be pushing the reason and nature of things beyond the limits of natural justice:" page 551.

The Stamp Act of Congress of June 30th, 1864, is certainly more obnoxious to the constitutional objection here raised, than the Act of October 13th, 1870, of our Legislature. The Act of Congress not only imposed a tax on notes, etc., made before its passage, but also required an additional tax to be paid in shape of a stamp upon the writ, when the holder brought suit on pain of a dismissal of the action. But it is said the intention of the Legislature was to destroy these contracts made prior to June, 1865, and that intention being unconstitutional, the Act is void. It seems to me counsel do not draw with sufficient accuracy the distinction between the intention to do an act, and the obvious consequences which may result from the act when done.

The intention of the Legislature was manifestly to deny the use of the Courts to creditors, in this class of contracts, until they had paid all back taxes due on such contracts. The result of such denial has been that many have abandoned their claims. It was not compulsory upon them to do so. Many, it is true, misread the law and supposed it required that the taxes should have been each year paid to enable them to maintain their suits. A glance at the title, which, under our Constitution, controls the body of the Act, would have disabused their minds of that idea, even supposing the body

of the Act could be so construed, which I think I have shown is not true. Many litigant plaintiffs have paid their taxes and thus retained their suits in Court. It is by their cases that the constitutionality of the Act must be tested. If the Act "so changed the nature and extent of their existing remedies, as materially to impair their rights and interests," then it is void. If "when the contracts here in question were entered into ample remedies existed," and by the Act "all were taken away, not a vestige was left, every means of enforcement was denied," clearly the Act is unconstitutional: White *vs.* Hart, United States Supreme Court, December 7, 1871. This cannot be said. Suits are now pending or have gone to judgment, which have come under the operation of the Act, and have weathered the obstructions thrown in their way by its provisions. Keeping in mind that "the duty which the Court is called upon to perform, is always one of great delicacy, and the power which it brings into activity is only to be exercised in cases entirely free from doubt," I cannot say that the remedy is so materially affected as to leave my mind without very serious doubts as to the validity of the objection that the law impairs the obligation of contracts. Indeed, the weight of the argument is, to my mind, in favor of the constitutionality of the Act. It therefore is my duty to refuse to declare the Act unconstitutional.

6. If I am mistaken in my reading of the body of the Act, it undoubtedly is to be understood in the light of its title and controlled by it. That is so plain that he who runs may read. It denies to debts, contracted before June, 1865, "the aid of the Courts *until* the taxes have been paid." Supposing, then, the words in the body of the Act legitimately bear a retroactive interpretation, "yet on a sound construction of every Act of Parliament, the words in the enacting part must be confined to that which is the plain object and general intention of the Legislature in passing the Act; and the preamble affords a good clue to discover what that object was:" Broom's Legal Maxims, 247. Under our Constitution the title affords

a controlling clue to discover what that object was. *Quando res non valet, ut ago, valeat quantum valere potest.* To the extent of the title, then, the Court should give effect to the first four sections of the Act. Therefore, in all suits pending at the time of the passage of the Act, for debts founded on contracts made prior to June, 1865, the taxes must have been paid, and the affidavit filed within six months after the Act passed, and in all suits commenced after its passage, at the time of filing the writ, on pain of having the case dismissed on failure to do so. The law, if variant from its title, is invalid only to the extent of the variance, 4 Georgia Reports, 26; 12 *Ibid*, 36.

7. Much has been said of the corrupt motives by which the Legislature which passed this Act was controlled. If Congress or a State Legislature passes a law within the general scope of their constitutional power, the Courts cannot pronounce it void, merely because, in their judgment, it is contrary to the principles of natural justice. "There are but two lights in which the subject can be viewed: First, if the Legislature pursue the authority delegated to them, their acts are valid. Second, if they transgress the boundaries of that authority, their acts are invalid. In the former case they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust, but in the latter case they violate a fundamental law which must be our guide whenever we are called upon as Judges to determine the validity of a legislative act:" Calder *vs.* Bull, 3 Dall, 399.

Again. "That corruption should find its way into the governments of our infant republics and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored."

"It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements operating on members of the supreme

sovereign power of a State to the formation of a contract by that power are examinable in a Court of justice. If the principle be conceded that an act of the supreme sovereign power might be declared null by a Court in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of its members? Would the Act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

"If a majority of the Legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct, and if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned." "It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a State." With much more to the same effect, in Fletcher *vs.* Peck, 6 Cranch, 130. Chief Justice Marshall delivering the opinion.

8. It only remains to be added, as more exclusively applicable to the cases under consideration, that where a bill to marshal assets has been filed by an administrator against the creditors of an estate represented by him, whose claims are antagonistic, and some of the claims are founded on contracts entered into before June, 1865, it is not necessary for creditors holding such claims to file an affidavit of the payment of taxes with their answers, their claims having been brought into Court by the administrator, and not by themselves. On the trial of the case, however, they should make it clearly appear that the taxes have been paid, to entitle them to a decree for the payment of the claims.

9. Subscriptions to the stock of the Macon and Augusta Railroad Company, made before June, 1865, stand upon the

same footing with other debts contracted before that date; and in suits against the subscribers for the amount of their subscription, the payment of the taxes and the filing of the affidavit, as required by the Relief Act of 1870, are necessary. Judgment in the case of the Macon and Augusta Railroad Company *vs.* Frank L. Little, executor, affirmed. Judgment reversed in Jackson B. Johnson, administrator *vs.* R. Stokes Sayre, on the ground that the creditors, holding claims founded on contracts made before June, 1865, should have proved payment of taxes on those claims to entitle them to a decree for the payment of the claims.

McCAY, Judge, concurring.

The validity of the Act of October 13th, 1870, requiring an affidavit to be made that all legal taxes have been paid upon any debt, dated before June, 1865, on which a suit is founded, on pain of the dismissal of the suit, is attacked upon two grounds:

1st. It is said to be in violation of Article I., section 10, paragraph 1, of the Constitution of the United States, prohibiting *ex post facto* laws and laws impairing the obligation of contracts.

2d. It is said to be invalid because the session of the General Assembly—the session of 1870—had been in session more than forty days at the date of its passage, without any two-thirds vote of each House prolonging the session, which it is claimed is required by paragraph 3, Article III., section 1, of the Constitution of this State.

The decision of the first point turns, in my judgment, almost entirely upon the meaning of the law. If the necessary construction of it requires that it be understood to enact that if the holder of a debt have, during any particular year since the debt was contracted, or during the entire period since that time, neglected or refused, at the precise time, provided by law for so doing, to give in and pay the legal taxes due thereon, the suit shall be dismissed, then I think

e argument is strong with the plaintiff in error. But we ve held that, construing the Act by its title, by the nature its provisions, and, above all, by that well settled rule hich makes it the duty of Courts, in declaring upon the lidity of an Act of the General Assembly, so to construe , if possible, as to make it conform to the Constitution, it s no such meaning as is contended for. That it is pros-ective only in its operation; that it denies the use of the ourts *until* the taxes are paid, and not because they have ot been paid; that the holder of a debt, not in suit, or of judgment, may at any time pay the legal taxes due, and ommence his suit, or levy his *fi. fa.;* that if his suit was ending at the passage of the law, he had six full months, ithin which, if the taxes were unpaid, to pay them, and ake the affidavit required. We have held, also, that in ases where it was impossible he should know whether the axes were paid or not, he was only required in his affida-vit to cover such time as came within his power to know. And after labored argument and mature deliberation, we ee no reason to change our opinion upon the proper con-truction of this Act. The form of the Act is to require very plaintiff in a suit, at the time it is brought, or if pend-ng, at the date of the Act, then, within six months, to make n affidavit that all legal taxes due on the debt *have been* ully and regularly paid, on pain, not of losing the debt, but imply of the dismissal of that suit. The terms of this law n be complied with by any one, who, *at the time the affida-it is filed*, can truly make the oath, and even if his suit be smissed, if at any time *thereafter* he can truly make the th, he can commence again.

The title of the Act, so far as it pertains to this part of e law, declares it to be an Act to deny the aid of the Courts a certain class of contracts, not because, but *until* the legal es due thereon have been paid. And the body of the Act rmits the party to go into Court with his suit, or if in, to on with it *whenever* he is ready to swear that the taxes

have been duly and regularly paid. As to pending suits, it is true a time is limited; but each suitor has full six months within which to qualify himself to make the affidavit, by paying to the public the debt he owes for taxes upon the contract he is seeking to enforce. The words used in the Act are, "duly and regularly paid." In another place, "duly paid for each year," and again, "regularly given in for taxes and the taxes paid;" and again, section 5, "duly paid."

It is said no man can truthfully take the oath required, unless he have given in and paid the taxes at the precise time, and in the precise manner provided by law, and not if he have given and paid them at some other time and manner permitted by law. Under this view no man can say he has *duly paid* his tax for any year, if he has waited until a *fi. fa.* has issued against him, or if he has failed to give in, and has been double taxed as a defaulter, and *duly paid* that; or if he has waited till after January, as thousands do every year, and paid the tax of 1868 in 1869. In either of these cases, there is a deviation from the ordinary mode of giving in or paying.

The ordinary time for giving in is by the 1st of July, (Code, 830,) but any one may give in to the Clerk at any time after this before the digest is made up, which is by the 1st of August: Code, 840, 845. So as to paying, the ordinary time is by the 1st of October: Code, 830. But how many persons in all the counties, good law-abiding men, too, fail to pay by that time? Indeed, a long experience as a county officer, informs me that but few persons pay before the 1st of October. Now, it seems to me, there is not a man in the State who, if he had given in to the Clerk, or had paid his tax, say for 1868, by the 1st of November, or any time in 1868, or even in 1869 or 1870, would not feel free to swear that he had regularly given in and paid his tax.

To give the Act the construction contended for, would be a species of word construction and hypercriticism, almost unheard of in modern times. It would be *straining* the lan-

uage of the law in order to make it have an unconstitutional eaning, when directly the opposite is the settled rule for the onstruction of laws. I will not say such a meaning cannot e given to it, but I will say that such a meaning is not a air construction according to the established rules for construing statutes. Anything may fairly be said to be duly nd regularly done, which is done as permitted by law. A man is duly elected to an office, if he receive a majority of the votes at an election had at the legal time by proper officers, though there may be great irregularities in the manner of holding the election.

Had the Legislature intended the meaning insisted on they would have used the imperfect "were duly paid," and not the perfect "have been," which, whilst it expresses as past time, also conveys an allusion to the present. A marriage is good, though there be no license, as provided by law, and parties so married are duly and regularly married, even though this important provision of law is not complied with. If a man has paid all his debts, even after they are due, or in something less than money, or even at a discount, by consent of the creditor, is it an improper use of language for him to say that his debts have been duly and regularly paid? Is the man who is entitled to a deed on the *due* payment of a note, not entitled to it if he pay the note after it is due, or if he tender the money after it is due? Is it not the uniform construction of the Courts that (in cases where the parties *may*, by the use of proper words, make time the essence f a contract,) the use of the word duly, does not do it? hat may be very fairly said to be done duly and regularly, done as the law points out, or if not, as the law permits. ur Code, section 866, permits any tax-payer to give in and y taxes he owes to the State for past years. And specially akes it the duty of the receivers and collectors to receive d collect such over due taxes. I conclude, then, that it is fair and reasonable construction of these words, to say that ey mean "fully" all that is due, "completely," so that the

account between the State and the party is, in a substantial sense, duly and regularly settled. Any other construction would make the Act different from the title, would make it *ex post facto*, and would be contrary to the well settled rule that the Legislature is not to be presumed to have intended to pass a void law, and that other rule, equally well settled, that the most free construction of an Act may, and ought to be resorted to rather than to admit such a sense as will make the law unconstitutional. These are familiar rules and are supported by abundance of authority.

I am, therefore, *driven* to the conclusion that this Act is prospective *only*. That it imposes no penalty for any past act, and is not, therefore, *ex post facto*. Very nearly the same line of thought is conclusive, also, upon the other objection to this law, to-wit: that it imposes new conditions upon the contract, and denies the remedy except upon terms that did not exist at the date of the contract, and therefore impairs its obligation.

It must be remembered that this Act imposes no tax. It only requires the payment of such taxes as are legally due by laws passed in the ordinary course of legislation. For twenty years we have taxed all *property ad valorem*, and debts being property, have always, since the *ad valorem* system was adopted, been taxed as other property. The taxes required by this Act to be paid are the taxes due the State—due last year, due year before last, and perhaps for other years before that. They are due now just as much as they were then. The fact that the tax payer failed to return a note to the Tax Receiver, or that he has allowed his tax for any one or more years to go unpaid, does not clear him of the liability.

It is notorious, that this class of property—debts, notes, bonds, judgments, etc., are most shamefully hidden from the Tax Collector. They are easily hidden. It is notorious, also, that debts contracted before June, 1865, have been specially concealed. Various expedients have been tried by the Legislature to force notes, debts, bonds, judgments, etc., to

' their share of the public burdens. The oath of the tax
er is appealed to—he is required to *give in* his taxable
perty. If he fails to do this, and it can be found, it is
ble taxed. But many persons have been in the habit of
ing double tax rather than reveal their secret property.
meet this, the officers are required to find out all they
then double tax it—next year double that, and so on,
bling each year, until the tax payer is compelled to show
hand.

f these taxes, which in many instances have been thus
mulating for years, are really due—and nobody can doubt
—can it be said that the State can use no remedy to en-
e the payment of them except such as existed at the time
tax first became due? Surely not. The State, finding
other remedies inadequate, and knowing that to a very
ge extent these debts are and will be in suit, says to the
ners of them: You owe taxes to the State on these very
ds you are putting the country to the expense and trouble
nforce; pay these taxes or you shall not go on! Had the
ders of these debts come up to the rightful demands of
State—had they, on the passage of this law, sought the
t Collector and Receiver, given in their debts as property
taxation, making a clean breast of it for the past, the
e would have reaped the benefit. But they have chosen
lo otherwise; they grow indignant at this imposition, and
rmine to litigate to the bitter end their constitutional
t to refuse to bear their share of the public burdens, and
claim, with great gravity, the public protection. They
se to pay the tax, or it they have already paid it they
d upon their dignity, or their rights, and refuse to make
affidavit, and come before this Court asking us to remove
obstacle which the Legislature has thus placed in their
. Our reply is, the obstacle is one of your own making,
it is not in our power to remove it. The Act is a legiti-
e exercise of the power of the State to force its defaulters
ay to it their tax. That the remedy the State has chosen

falls upon the contract, that incidentally it works delay to you in the collection of your debt, is not the fault of the law, but is caused by your own willful, persistent refusal to pay to the public its just demands against this very debt. If the taxes have, in some instances, got so large that you would rather loose the debt than pay them, it is only the stronger reason why you should not go on, since the debt belongs to the State. And in such cases remember the tax is still due whether you go on or not. You have only exposed yourself to the public authorities, and this very exposure is notice to the Tax Receiver and Collector that you are behind with the State, and ought to be inquired after.

I hold, therefore, that this Act impairs no obligation of a contract. It clearly does not affect its terms, and if, as I have undertaken to show, the Act is a legitimate exercise of the powers of the State to enforce the payment of its taxes, the fact that it effects the remedy is no objection to it.

Judge Swayne, in Von Hoffman *vs.* City of Quincy, 4 Wall, 553, where he announces the proposition that any law which lessens the value of a contract may be said to impair the obligation, immediately adds, "but this is to be understood of laws which do so directly, and not when the injury is incidental." And he gives the case of an abolition of imprisonment for debt as an instance of what he means. Here the debt may be seriously lessened in value. Imprisonment may have been, and, indeed, often was, the only effectual remedy in the power of the creditor, and the abolition must, of necessity, seriously lessen the value of the debt. And yet Judge Swayne, in the very next breath after announcing the rule and the qualification, gives the abolition of imprisonment for debt as one of the instances of State legislation not in violation of the Constitution.

The true rule, as I understand it, as gathered from a careful study of all the cases decided by the Supreme Court, is, 1st. The State cannot, by legislation, affect the *terms* of the contract, in the slightest particular. In respect to the actual

greement of the parties, that is unalterable by legislation. t is not, so far as this is concerned, a question of degree; the ower to affect at all is denied. But, as the remedies are, of ecessity, matter largely in the discretion of a State, the rule s to them must, necessarily, stand on a different footing, since ny *alteration* of the remedy may, *to some extent*, affect the rights of the parties at the date of the contract.

In legislating, therefore, upon the remedy, which *all* the decisions acknowledge to be within the legislative power, the alteration of the law must not be of such a character as does indirectly what may not be done directly. To say that, in altering the remedy, nothing can be done which lessens the value of the debt, is to deny the power over the remedy altogether. In this respect, therefore, the question is one of degree, and the rule is, that the legislation is void if it does not leave to the creditor a substantial remedy. It is true this is not a very definite rule, since it leaves every case to the conscience of the Court. But it is the only rule compatible with the acknowledged right of a State to modify its remedies at discretion.

In the case at bar, it was notorious, as I have said, that the State was defrauded of its taxes upon this class of property. It was easy to hide, and it was largely hidden from the Tax Receiver and Tax Collector. Various remedies were tried and failed. At length, in view of the fact, that when the aid of the Courts was sought to enforce a debt, there was, of necessity, an exposure of the property to the public eye, the emedy of this Act was adopted. The law is a good one. It s no hardship on an honest man. It merely says to him, as he United States says in the Stamp Act, pay your tax, or ou shall not go on with your suit. Even if it imposed a ew tax, which it does not, in what would it differ from the nited States Internal Revenue Act of 1862? That Act quired a fifty cent stamp on every process, and the Courts ' all the States, as well as the Courts of the United States, are required to refuse to admit papers, and some of them

made before the date of the Act, in evidence, until they were stamped according to the Act. Except for the perverse determination of the holders of these claims not to obey the law and pay to the State the taxes due on these very debts, this Act would have secured to the State a handsome revenue.

My own opinion is, that this Act ought to be extended to all debts, and the money-lender and note-shaver be brought to bear his share of the public burdens, and this is the more proper, since it is by the right to sue, and the fear of its exercise, that his debts are of value to him.

The question of the legality of the session of the Legislature of 1870, after forty days from its commencement, is of the utmost importance. It so happens that during that session and after the forty days, an Act was passed changing the time fixed in the Constitution for the general election, as well as an Act changing the time fixed in the Constitution for the annual meeting of the General Assembly. Both of these Acts, though expressly authorized by the Constitution, are void, if the Acts of that session passed after forty days are void. The present Legislature was elected under one of these laws, and held its session of 1871 under the other. Thus elected and thus meeting, the present Legislature passed an Act authorizing a special election to be held for Governor, to fill the unexpired time of Governor Bullock, and Governor Smith is now, by virtue of his election under that law, the Governor of the State. Without this action Mr. Conley would, under the Constitution, perform the duties of that office until the regular election for Governor. Governor Smith, thus elected, has appointed a majority of the Judges of this Court. It may also be stated as another fact, that the session of 1870, after the forty days, changed the time of the meeting of the Supreme Court, and this Court, since its session in January, 1871, has met and is now in session under and by virtue of that law. If the Legislature, at its session of 1870, was illegally in session after forty days from its commencement, and if its Acts dur-

g that session are illegal, it would seem to follow that the cts of the present Legislature stand upon the same foot- g, as *it* was elected and has held its meetings at a time fferent from that fixed by the Constitution. The same line reasoning applied to the session of 1870, would render valid the Acts of the present Legislature. The Governor id the Supreme Court fall by the same logic. The result that every branch of the government, legislative, execu- ve and judicial, is, if the Acts of the session of 1870 are oid, illegal and without constitutional authority. So start- ng a consequence calls for great hesitation. One cannot but spect some error in a conclusion, the logical results of which re anarchy and confusion. My own mind is well satisfied hat the session of 1870 did not need to be prolonged by a wo-thirds vote. But my judgment in this case is put upon hat I deem stronger and more impregnable ground. It is ny conviction that, under the Constitution of the State, the udiciary has no power to pass upon the question of the egality of the Legislature, and that the decision of the body self, whether made directly as was not done in this instance y a solemn vote of each House, or even indirectly, as if the ody continue in session after the expiration of the forty ays, is conclusive whether right or wrong.

The form in which this question is made does not fairly resent the real issue. A particular law is attacked on the round that it is unconstitutional, and this is said to be so ecause it was passed by the General Assembly at its session 1870, more than forty days after the commencement of the ssion, the same not having been prolonged by a two-thirds ote. This is not a question of the constitutionality of a law, it of the legality of the Legislature. The question is not hether the law is within the scope of legislative power— hether its provisions contravene any constitutional guaran- , or violate any constitutional prohibition. The question not whether the Legislature, in passing it, conformed to e requirements of the Constitution as to the mode and

manner of passing laws, whether the title and the body of the Act conform to each other, nor whether there be two subjects matter in the same bill; but the point insisted upon is that the Legislature, at the date of its passage, was illegally in session—that it was no Legislature—that it had no power to pass laws, and that not only this but all its other Acts, passed after the expiration of forty days, are void.

I have been thus particular in stating the question because I think much of the apparent strength of the argument of those who attack this law is derived from the notion that they are assailing the constitutionality of a law, when, in truth, they are assailing the legality of the Legislature which enacted it.

It is not only the right but the solemn duty of the Courts to pass upon the constitutionality of laws. But the constitutionality of a law and the legality of the Legislature which passed it are wholly different things. Over the former, the judiciary has jurisdiction; over the latter, in my judgment, it has not. Very serious question has been made whether Courts, in their inquiries into the constitutionality of laws, are not confined to an examination of the law itself, as it appears on the statute books. It has been contended by learned Judges that while Courts may inquire if the *provisions* of a law are contrary to the Constitution, and, (still keeping to the Act as it appears upon its face,) whether the body of it conforms to the title, and whether there be more than one subject matter, etc., that this exhausts their authority. They cannot go behind the Act itself, examine the journals of the two houses, or learn from other sources whether the Legislature conformed, in its passage, to the constitutional requirements as to the mode and manner in which bills shall be introduced, read and voted upon.

And this limitation upon the power of the judiciary would seem entirely consistent with section 32 of our bill of rights, which provides, "that *legislative Acts*, in violation of this Constitution, are void, and the judiciary shall so declare

iem." There is an obvious distinction between a "legis-tive Act" and the mode in which that Act has been intro-ıced, read and voted upon. But, though, as I have said, is distinction has been drawn, I am inclined to think the eight of authority is in favor of the right of the Courts to , at least, to the journals and inquire if they show the oper and constitutional proceedings to have been had *on the ıssage of the law.*

But the cases are uniform that the journals are conclusive; ıat, however untrue, in fact, the journals may be, they are be taken for true, and nothing will be heard in contradic-on of them; and this upon principles of public policy, and spect of one branch of the government for the other, as ell as upon the further principle that even Courts, in the arch after truth, recognize finalities behind which they will fuse to look. But, as I have said, the question made in is case is not really upon the constitutionality of the law, to its provisions, or its title, or even as to the mode in hich it was introduced, read and voted upon, but upon the nstitutionality of the Legislature itself—upon its authority pass any Acts. Being, as it is claimed, in session contrary the Constitution, it was not, at the time, a legislative ody at all, but a mere mob, incapable of making laws of ny kind.

Is it competent for the Courts to decide upon the legality f a session of the Legislature? I think not. It was ad-ıitted by the two able gentlemen who, with such ability, rgued this case against the validity of this law, that there re some questions upon which the decision of the Legisla-ıre is conclusive; so that, even if it decides wrong, no other ibunal can re-examine them. The Constitution expressly ys that each House shall be the judge of the election and ualification of its own members. It was, in the argument f Mr. Stephens, admitted that, for a wrong judgment in ch a case, there is no remedy, and such is, without doubt, e universal opinion. And yet the Constitution does not

say each House shall be the *exclusive* judge, even of the election and qualification of its members. Upon the principles asserted in the general argument, to-wit: that the Courts must inquire into the truth and judge for themselves, however it may be, that other branches of the government must also judge for themselves, it seems to me that if a case arise where a law is attacked, on the ground that it was passed by the votes of members of one or the other House, who were not legally elected, that the inquiry cannot be declined, since, as I have remarked, the power given to each House over the subject is not, in terms, exclusive. The truth is, the object of this constitutional provision was not so much to confer this power, and to confer it exclusively against the Courts and against the executive, as to confer it upon each House, to the exclusion of the other. It needed no provision to protect the Legislature against the scrutiny of the Courts on this subject. It must, in the nature of things, be in the power of a legislative body to declare, and declare conclusively, who compose it, and whether it is properly organized and in session according to the Constitution and laws. Such questions enter into its very existence, and MUST be decided before it proceeds to business, and to make them the subject of review before the Courts, is not only to make all legislation uncertain and inconclusive, but to exalt the Courts to supreme power in the State.

But it is said that this Court is bound by its oath of office to see to it that the plain letter of the Constitution is not violated, and that no Act can have the force of law if it be the product of a Legislature in session in violation of the Constitution. It has been asked if a Legislature, five years hence, when the first two sessions will, without question, have been held, should hold a session and pass laws, more than forty days after its commencement, without a constitutional prolongation, would such laws bind the Courts? In reply, it *might* be said, this is not such a question. In this case there was a hot dispute over the matter; men honestly dif-

ered as to the truth of the case, and the decision was made. t has, too, been acted upon for two years by the people, by he executive, and by this Court, until it has become a *fait ccompli;* until it has entered as such into the whole organzation of the State, in its legislative, executive and judicial lepartments, so that to disturb it is to inaugurate anarchy. But a question is not an argument. To suppose that a grant of power will be abused; that a wise and salutary rule, adopted for sound reasons of public policy, will be wickedly and recklessly perverted by the General Assembly of the people, is no argument against the existence of the grant. It may be a good reason for refusing to give it, but to argue that because it may be abused it does not exist, is very weak logic. Suppose this Court were to give a judgment plainly wrong, would it not be nevertheless binding upon the parties? Nothing is better settled, as a rule of law, than that the judgment of a Court of competent jurisdiction is conclusive, no matter whether it be right or wrong. Not a term of this Court passes in which we do not hold that such a judgment cannot be inquired into. It may be a wrong judgment, founded on mistake of law or fact, yet, the rule is uniform that it is to be treated as true and right. Whether it be so in fact or not, the Court refuses to inquire.

Is this a bad rule? Is this the sanction of illegality and wrong? Or, is it any reply to this rule to say that under it decisions may be made and be final, of gross and outrageous illegality? Does it at all follow that if it be admitted, that he decision of such questions by the Legislature is conclusive upon the Courts, they will be decided wrong? Are not he members of that body under oath, and is it to be presumed that they will disregard that oath? Is the Constiution less safe in their hands than in the hands of the udiciary? Is a provision of the Constitution, evidently inended, not as a limit upon the legislative power over the itizen, or as a rule to be observed in the passage of laws, but provision to secure a diligent attention to business and

to spare the public purse, more apt to be obeyed under a power in the Courts to enforce it, than under the power of the ballot to punish its infraction?

In every government, power must be trusted somewhere. There must *always*, upon *every* matter, be a final arbiter from whom there is no appeal, except to the people or to arms. This Court treats as final the final judgment of even a Justice of the Peace upon a matter within his jurisdiction, no matter how wrong it may be. It will not hold it to be right; it simply refuses to enter upon an inquiry on the subject.

The truth is, this world is full of *ultimata*, and human life and human society would be a curse without them. There are *ultimata* in philosophy, morals and politics. The profoundest philosopher must assume the existence of matter, though he can know nothing of it but that it has certain qualities. We all live upon land wrested by wrong from the Indians; our whole social and political polity, until the late war, was based upon what nobody ever undertook to defend, the African slave trade. And there are but very few of us who can trace our title to anything very far ere we find the channel through which it has come sadly befouled with fraud and crime.

But it is in politics that *ultimata* are found most necessary for the public good. There is hardly a government in the world that can show a regular chain of title to its powers. Illegitimacy is written in deep imprints upon almost all of them, and the wandering Bourbons, who for nearly a century have been asserting the rights of legitimacy and regularity, have become a type of folly and imbecility. Lord Summers' call of the Parliament of 1688, irregular and illegal as it was, dethroned the Stuarts and established English liberty, and the history of English law and of English liberty is full of just such irregularities, which having entered as an element into the very texture of the government, have become *ultimata*, which are treated as legal, whether they be in fact so or not. If the irregularity be great, we call it a revolu-

ion, and accepting the result shut our eyes to the past. But f closely looked to, every successful illegality is a revolu- ion. The necessities of State require it to be treated as a inality. And the history of the last ten years, with its pres- nt results, only shows us that even in governments with a ritten constitution, also a necessity, *ultimata* are also a State ecessity. What constitutitional lawyer would have deduced rom the nature of our government, and the provisions of our Constitution, the possibility of the history of the last twelve ears; the coercion of States by Federal arms, the abolition f slavery by Federal power, and the establishment of the resent governments in the so-called rebel States by Federal legislation. Yet nine-tenths of the American people are to- day accepting these results as finalities. And the Supreme Court of the United States have lately, by a solemn judg- ment, declared them *ultimata*—the work of the political de- partment of the government, in its judgment upon an anom- alous and exceptional state of public affairs, over which the judiciary has no jurisdiction. *Stare decisis* is an accepted and valuable rule for the regulation of Courts, even in ordi- nary matters, but when its application becomes necessary to prevent anarchy in the government itself, it is doubly im- portant.

Let it then for the sake of the argument be admitted that the two Houses decided the question of their right to sit without a two-thirds vote of prolongation wrongly, it does not by any means follow that the laws passed at the subse- quent sessions are void. The decision was by a tribunal com- petent to decide it, and having exclusive jurisdiction over the question, and if even this be not so the decision has, by the course of events, become so blended with the very organ- ization of the State, that it stands as an *ultimatum*, not subject to inquiry. But there is a less abstract view of this subject which, as it seems to me, is equally conclusive. As I have said, the question made is not so much the constitutionality of the Act under review as the legality of the Legislature

that passed it. By assuming jurisdiction over this question this Court assumes a power of control over the Legislative department of the government that, most certainly, it cannot exercise *directly*. Very clearly, no writ of *quo warranto* or injunction would lie before any Court, either to test the legality of the Legislature, or the right of the Governor to perform the executive functions. Were there two persons claiming to be Governor, perhaps the Courts might decide, not which was the rightful officer, but which was recognized as such by the General Assembly, and if there were two bodies, each claiming to be the Legislature, the Courts, whilst, during the contest, they must and would be powerless, might, after the contest was over, recognize that as the true one which was practically successful with the people. But, by no direct action, can the Courts try the legality of the Legislature. If they cannot do this directly, by a proceeding for the purpose, can they do so indirectly, by deciding upon the validity of the Acts it may pass, on the ground that the body *passing them was not a legal body?* To set up the judiciary as an arbiter of the legality of the Legislature, a co-ordinate department of the government; to make it the oracle to which contending revolutionists shall come for judgment as to who is right, is to enthrone it as the supreme power in the State, and to confer upon it a jurisdiction dangerous to its own existence, and never contemplated by the fundamental law. To decide when a law conforms to the Constitution is one thing, to decide, who are the law makers is another. To do the one, the people have expressly granted to the Courts; to do the other, there is not only no grant, but the claim of such a right is a claim foreign to the nature of the judicial office, dangerous to the independence of the legislative and executive departments, and contrary to the first principles of a government of the people.

Necessarily, the Courts must decide what is the law—what is the legal will of the *law-making* power. But if they have the right to go behind this, and to inquire whether the law-

g power is itself legal, they become, in effect, the su-
power in the State. A case may be supposed of a
-a mere public meeting—undertaking to pass laws, and
ked if the Courts, when the acts of such a body are
d as law, must not inquire into the rightfulness of the
of the body to be a law-making power. In such a
he inquiry by the Courts would be, not the rightful-
f the authority; not its conformity to any written code
stitutional law, but whether it was in *fact* the legisla-
partment of the government, recognized as such, by
ople, or by whatever final arbiter has power to enforce
cts. In other words, Courts do not make governments,
ide upon their validity. If they cannot recognize as
l, the law-making power, which is, in fact, supreme,
ust get out of the way, and not attempt, by their
arm, to stay the tide of revolution. Luther *vs.* Bor-
Howard, 1.

there is another ground, which, though it assumes the
f the Courts to pass upon the legality of the Legisla-
irectly, is fatal to the position taken against this law.
settled rule, that even where Courts have power to
e into the right of an officer to perform official acts,
vill not do so collaterally. They will freely investi-
e legality of any particular act, but they will never,
doing, inquire into the right of the officer to act, as
t all. The rule is uniform, that the acts of an officer,
ise legal, cannot be attacked on the ground of any
ity in his appointment, or on the ground that though
n officer in fact, he is not so according to law.

ot the General Assembly, actually in session, entitled
he Courts to at least the same measure of consideration
r grant to a constable or a Justice of the Peace? Will
urts, in inquiring into the validity of the acts of even
umble officers as these refuse to declare them illegal,
e of a defect in the legal title of the officer to his po-
and yet determine an Act of the Legislature invalid

because of a defect in its title to perform legislative functions? There is one thought more which occurs to me as a conclusive reply to the claim of *this Court's* jurisdiction over this question. As I have said, it so happens that the regularity and legality of the whole of the legislative, executive and judicial departments of the government, as they at present exist, depend upon the validity of the Acts of the session of 1870 after the forty days. I have, as I think, clearly shown that those Acts are valid, and that the government, as it now exists, stands upon impregnable ground in any view of the case the Court is authorized to take. But assuming the contrary—assuming that the Acts of the session of 1870 were void, because the Legislature was sitting at a time prohibited by the Constitution, precisely the same objection lies to the legality of this Court. It is also sitting at a time not authorized by law, if those Acts be void. It is held, also, by men appointed and confirmed by a Governor and a Senate, elected and meeting at a time not authorized by the Constitution, and in the very same breath with which it should declare the Acts of the session of 1870 invalid and void, it would declare itself illegal. It would, upon the very same principles, be no Court, and be thus without power to pass authoritatively upon the question.

For these reasons I am of the opinion, that the Acts of the session of 1870 are not void, even though the Legislature may have decided wrongly, when it declared the session of that year not to need a two-thirds vote of prolongation; that the rules of law, the natnre of the question, and the necessary balance of power among the different departments of the government, deprive the Courts of jurisdiction over the subject. If these principles be correct, it is wholly immaterial for the purposes of this case, whether the session of 1870 was a session after the second or not. That it was the intent of the framers of the Constitution to allow two sessions after the Constitution should go into operation, as the supreme law, independent of military interference, seems unquestionable;

and it is an undoubted fact that the session held after July, 1870, was not the third session after this military interference ceased. It would seem to follow, almost inevitably, that the session of 1870 did not need to be prolonged by a two-thirds vote. My brother Montgomery puts his judgment mainly upon this ground, not that he doubts the soundness of the positions I have taken, but because he is thoroughly satisfied of the soundness of that view of the case, and the great pressure of labor on this Court renders it inconvenient for both of us to discuss the whole subject. I may make the same remark for myself. I am satisfied with my brother Montgomery's view of the matter. But I prefer to put my judgment, in the view I have taken, leaving the discussion of the other view to his discretion.

WARNER, Chief Justice, dissenting.

This was an action brought by the plaintiff against the defendant on the contract of his testator as a subscriber for fifteen shares of the capital stock of the Macon and Augusta Railroad Company, to recover the amount due for his unpaid stock. On the trial, the defendant made a motion to dismiss the plaintiff's action, on the ground that it was a debt existing prior to the 1st of June, 1865, and that no affidavit had been filed, that all legal taxes due thereon had been paid as equired by the Act of 13th October, 1870. The Court dismissed the plaintiff's action, to which ruling of the Court the plaintiffs excepted. The Act of 13th of October, 1870, so far as it applied to the plaintiff's debt, is in violation of the 10th section of the first Article of the Constitution of the United States, and is therefore void. See concurring opinion in Scott, guardian, *vs.* Dysart & Vinson, decided at the present term. That Act is also void, as having been passed in violation of the express provisions of the Constitution of the State of Georgia. The Constitution of 1868 declares that, "No session of the General Assembly, after the second under this Constitution, shall continue longer than forty days,

unless prolonged by a vote of two-thirds of each branch thereof." This Act was passed at the *third session* of the General Assembly under the Constitution of 1868, more than forty days after the commencement of the third session, which was not prolonged by a vote of two-thirds of each branch thereof, and is therefore null and void as *a law of this State*. My reasons for this judgment were fully expressed in my dissenting opinion in the case of Gormley, Ordinary, *vs.* Taylor, (not yet reported) and will not be again repeated. All legislative enactments, which are to be binding upon the people, as *laws*, must be enacted in pursuance of the requirements of their Constitution, and if not, whenever they interfere with the rights of the citizen, such citizen may appeal to the Courts and have them declared void; for the Constitution of 1868 expressly declares that, "legislative Acts, in violation of this Constitution or the Constitution of the United States, are void, and the judiciary shall so declare them." If the Courts may inquire into the validity of legislative Acts passed by the General Assembly when sitting *within* the time prescribed by the Constitution, much more may they inquire into the validity of pretended legislative Acts which were passed at a time *prohibited* by the Constitution, because there is no legal presumption in favor of the validity of legislative enactments passed at a time expressly prohibited by the Constitution, although they may have the form and color of laws upon the face thereof, the more especially when it is apparent that such *pretended laws* were intended to deprive the *honest* people of the State of their legal and just rights to their property.

We may have a *corrupt* Executive, we may have a *venal* Legislature, (and such a state of things is not impossible,) still, if we have an honest, independent judiciary, the rights and liberties of the people may be protected; but if we have a mere *time-serving* judiciary, which will indorse and sanction the *usurpations* of the other two departments of the government, then the people will have no protection for

ither their persons or their property. The position assumed y the majority of the Court in this case, as I understand it, s that the session of the General Assembly of the State of Georgia, held in 1870, was not a session after the second, nder the Constitution of 1868, but that the sessions of the General Assembly of the people of this State, held in 1868, 1869 and 1870, were held under the Reconstruction Acts of Congress, and, therefore, that clause of the Constitution of 1868 which prohibits *any session* of the General Assembly fter the second, under that Constitution, from continuing longer than forty days, unless prolonged by a two-thirds vote of each branch thereof, has no application to those sessions of the General Assembly which were held in the years 1868, 1869 and in 1870. This position, in view of the plain facts of the case, is totally incomprehensible to my mind, and can only be accounted for on the principle of the old adage, that "when a fox is closely pursued he will run into almost any hole." The Constitution of 1868 was *accepted by Congress* as the organic law of the people of this State prior to the 21st July, 1868, in accordance with the provisions of the Reconstruction Acts, and that Constitution, so accepted by Congress, has never been interfered with as *the organic law of the State, by Congress.* It is true, that in December, 1869, Congress passed an Act to reorganize the General Assembly held under that Constitution, in accordance with their declared views of it, and it is also true that the General Assembly was *purged* by military authority, in violation of the provisions of that Act; but no Act of Congress has interfered with the provisions of the Constitution of 1868 since its *acceptance* by that body.

The General Assembly of the State of Georgia was created y the Constitution thereof, and owes its *existence* to that ganic law of the State, and no *session* of the General ssembly of the people of Georgia, provisional or otherwise, uld be held under any law except that which created it, d provided for its organization and election of its members.

Every session of the General Assembly of the people of Georgia, whether provisional or otherwise, must, *necessarily*, have been held under that Constitution which created it, and provided for its organization. If, since the acceptance of the Constitution of 1868 by Congress, under the Reconstruction Acts, there has been any unconstitutional interference by Congress or the military authorities of the United States, with the *sessions* of the General Assembly of the people of Georgia under that Constitution, such interference does not make the sessions held under it any the less *sessions of the General Assembly held under that Constitution.* The published journals of the General Assembly show that the *first session* of the General Assembly, under the Constitution of 1868, commenced in July, 1868, and adjourned *sine die* on the 6th day of October, 1868. The *second session* of the General Assembly under that Constitution commenced on the 13th day of January, 1869, and adjourned *sine die* on the 18th day of March, 1869. The *third session* of the General Assembly under that Constitution commenced on the 10th day of January, 1870, and was adjourned by proclamation of the Governor on the 25th day of October, 1870. The Act in question, now before the Court, was passed on the 13th day of October, 1870.

If the sessions of the General Assembly of the people of Georgia, held in 1868, 1869 and in 1870, were not held under the Constitution of 1868, under what Constitution, or under what law, organic or otherwise, was that body created and organized as the General Assembly of the people of the State of Georgia, and authorized to hold a session thereof?

The confessor of Ferdinand of Styria, the Jesuit, once said of him, that such was his *devotion* to his religious creed, that if a priest and an angel had met Ferdinand, that he would have made his obeisance to the representative of Rome, before he noticed the heavenly visitor. The majority of the Court, in order to sustain their judgment in this case, exhibit a wonderful *alacrity* to make their *obeisance* to the Reconstruction Acts of Congress, without *noticing the*

Constitution of the State, under which they hold their office, and which they are sworn to support, when there is nothing in those Acts which requires them to do so, in regard to the question now before the Court. But there is another difficulty in the way of the judgment of a majority of the Court, which, to most legal minds, would seem to be insurmountable. In *Foster vs. Daniels*, 39 Georgia Reports, 39, this Court *unanimously* held and decided that the Constitution of 1868 took effect and went into practical operation, on the 21st day of July, 1868. There is nothing in any of the Reconstruction Acts of Congress that interferes with or pretends to interfere with the principles settled by the unanimous decision of this Court in that case, in regard to the time when the Constitution of 1868 took effect and went into practical operation, and that is really the only question in the case now before the Court. The 204th section of the Code declares that "A decision, concurred in by three Judges, cannot be reversed, or materially changed, except by a full bench." This has not been done; and the majority of the Court, as well as the minority, were bound by it, unless they have the legal power to *dispense* with the stern provisions of the law.

If the Constitution of 1868, *as accepted by Congress*, took effect and went into practical operation under the Reconstruction Acts, on the 21st day of July, 1868, as this Court *unanimously* decided, then there is an end of the question, whether the sessions of the General Assembly of the people of Georgia, held subsequent to that date, were held under that Constitution, for they could not have been held under any other law except that which created that legislative body, and provided for its organization. I, therefore, dissent from the judgment of the Court in this case, and in the case of *Johnson, administrator, vs. Sayre et al.*

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JAMES F. DEUPREE *et al.*, executors, plaintiffs in error, *vs.* LUCY Y. DEUPREE *et al.*, caveators, defendants in error.

(McCay, Justice, did not preside upon the hearing of the following motion.)

1. Where one of the executors of a will to which a caveat has been filed married the sister of the wife of one of the Judges of the Supreme Court, said Judge is not disqualified from presiding by reason of relationship by affinity to said executor, upon the trial of said cause before the Supreme Court. (R.)
2. The executor having renounced in writing as executor of the will to the Ordinary, which renunciation had been entered of record before qualification as executor and during the pendency of a caveat to the probate of said will, such renunciation was binding on the executor, and the Ordinary was the proper officer to determine whether he had any of the assets of the estate in his hands, not accounted for at the time of such renunciation. (R.)
3. The legal presumption is, that the Ordinary performed his duty in regard to the protection of the assets of the estate before accepting the renunciation of one of the executors nominated in the will. (R.)

Relationship to disqualify Judge. Renunciation by executor. Before the Supreme Court of Georgia. January Term, 1872.

When this case was called in the Supreme Court, counsel for plaintiffs in error objected to Justice McCay's refusing to preside, on the ground that Thomas B. Moss, executor, one of the plaintiffs in error, had married the sister of his wife, and tendered to the Court the renunciation of said Moss of the trust conferred upon him by his appointment as executor, duly certified to by the Ordinary of Oglethorpe county. The Court, after taking the matter under consideration, rendered the following decision.

LINTON STEPHENS; PEOPLES & STEWART; REED & MORTON, for the objection.

ROBERT TOOMBS; J. D. MATTHEWS, *contra.*

WARNER, Chief Justice.

When it appeared that Moss, one of the executors of Deupree, married the sister of the wife of Judge McCay: *Held*, that the Judge was not related to Moss by affinity, so as to prevent him from presiding in the case, under the provisions of the 193d section of the Code. *Held, also*, that Moss having renounced as executor of the will, to the Ordinary, in writing, which renunciation had been entered on his records, before qualification as executor, and during the pendency of a *caveat* against the probate of the will, that such renunciation was binding on the executor, and that the Ordinary was the proper officer to determine whether he had any of the assets of the estate in his hands not accounted for at the time of his renunciation, it being the legal presumption that the Ordinary performed his duty in regard to that matter, for the protection of the estate, before accepting his renunciation as one of the nominated executors of the will.

JAMES F. DEUPREE *et al.*, executors, plaintiffs in error, *vs.* LUCY Y. DEUPREE *et al.*, caveators, defendants in error.

(This case was argued at the July Term, 1871, and the decision withheld until January Term, 1872. Chief Justice Lochrane in the meantime resigned, and Justice Warner was appointed to fill the vacancy, and Justice Montgomery was appointed to the vacancy created by the promotion of Chief Justice Warner. Justice McCay did not preside upon the first trial. The case was again argued before a full Bench, at the January Term, 1872.)

1. The marriage of a testator or the birth of a child to him subsequent to the making of a will, in which no provision is made in contemplation of such an event, is, by presumption of law, a revocation of the will, and this presumption cannot be rebutted by any declarations of the testator, whether by parol or in writing, at the time of the marriage, or even by a settlement on the wife, and a renunciation by her of all interest in the estate of the husband, unless the declarations or

provisions be testamentary in their character, and be executed by the testator with the forms and solemnities required for making a will.

2. A paper testamentary in its nature does not require for its due execution, an attesting clause declaring it a will, and reciting its execution according to the terms of the statute, pointing out how wills shall be executed. If it be subscribed by the testator, in the presence of the witnesses, and be attested and subscribed by them in his presence, it is sufficient.

3. If a testamentary paper be proven by the witnesses to have been subscribed by the testator in their presence, and they further state that they signed as witnesses, immediately thereafter, but they are unable, from want of recollection, to state affirmatively whether the testator remained in the room or not whilst they were subscribing, and seven or eight years have elapsed, there is a presumption of law, arising from the fact of attestation, that it was duly attested, and it was error in the Court to charge the jury that this presumption did not arise, unless the attestation clause recited the presence of the testator during the subscription of the witnesses.

4. Where there is an erroneous charge given to the jury a new trial ought to be granted, unless the evidence is so decidedly in favor of the verdict, that the jury must have found the same verdict even if the law had been correctly charged.

Witness cannot be compelled, in civil causes to attend Court out of the county of their residence. (R.)

It is in the power of parties under the direction of the Court to present the original paper propounded as a will to witnesses residing out of the county of the trial, by interrogatories. (R.)

The widow who was a party to a marriage contract with her deceased husband, which, together with another instrument, was subsequently propounded as his will, is a competent witness upon the trial of a caveat to the same, especially when she has barred herself from taking anything from his estate. (R.)

The answer of a witness being full to the material import of an interrogatory is sufficient. (R.) WARNER, Chief Justice, dissenting.

Caveat to will. Revocation. Subseqent marriage. Attestation. Continuance. Before Hon. WILLIAM M. REESE, an Attorney at Law, presiding by consent. Oglethorpe Superior Court. April Term, 1871.

On June 27th, 1853, Lewis J. Deupree having then a wife and two children, executed a paper purporting to be his will. On September 8th, 1859, his wife having in the meantime

died, he executed a codicil to the same. On May 24th, 1864, he married Lucy Y. Peebles, and in contemplation of said marriage, he and the said Lucy Y., on the day of the marriage, and before the ceremony was solemnized, entered into marriage articles, which provide for the settlement of $10,000 by the said Lewis J. Deupree, upon his intended wife, and for the securing to her sole and separate use her own property. These articles contained the following provisions: "And the said Lucy Y. Peebles, in consideration of the premises and of the settlement to be made as aforesaid, hereby renounces and forever relinquishes all claim of every sort which she may or might have by reason of said intended marriage, should it take place, upon any other part or portion of the property or estate of the said Lewis J., of every kind whatsoever (now belonging to him or that he may hereafter in anywise acquire) as heiress, distributee, by way of dower, or any other operation of law; also, all right to caveat or invalidate, upon any ground whatever, the existing will of the said Lewis J., and the codicils thereto, or any portion of either—it being understood between the parties to this agreement that said will and codicils shall remain in full force until they are altered, cancelled or destroyed by the said Lewis J., provided, however, that should any child or children be born of said contemplated marriage, and survive the said Lewis J., such child or children shall be entitled to take under said will as if they were expressly named, and receive legacies equal to the provision made therein for the children of the said Lewis J., now living, and subject to like uses and trusts, limitations and conditions." These articles were signed by both parties, in the presence of three witnesses, and immediately after the execution of the same, the parties were married. Lewis J. Deupree died in April 1870, leaving his widow, the said Lucy Y., and his three daughters, Mary L. Hunnicutt, Francina Deupree and Lucy G. Deupree, his only heirs-at-law. Neither the will or the codicil contained any provision in contemplation of said marriage, nor was any

alteration made in the same subsequent to the marriage. Under this state of facts, the heirs-at-law petitioned the Court of Ordinary of Oglethorpe county to declare the intestacy of said Lewis J. Deupree, and a portion of the executors of said Lewis J., subsequently propounded all the papers heretofore referred to as the last will and testament of said Lewis J., for probate. An appeal, by consent, was taken to the Superior Court, where the two cases were, by order of the Court and consent of the parties, consolidated and tried together. The probate of said purported will was caveated upon the following grounds:

1st. Because the said Lewis J. Deupree made no provisions in said will or codicil in contemplation of the marriage of the said Lewis J. with the said Lucy Y., and subsequently to said marriage made no alteration in either of them.

2d. Because the ante-nuptial agreement between the said Lewis J. and the said Lucy Y. is in all of its parts a contract entered into between said parties in consideration of marriage.

The two cases were submitted to the jury, and a verdict was rendered in favor of caveators against all of said papers as wills, finding that the said Lewis J. died intestate. When this case was called in the Superior Court, the propounders moved for a continuance and showed for cause that two of the subscribing witnesses to the paper propounded, bearing date May 24th, 1864, to-wit: John P. Atkinson and Cadesman Pope, who reside in the county of Meriwether in said State, had been served with subpœnas, were absent. They showed further, that the expense of attending Court had been tendered to said witnesses, and that the other subscribing witness, to-wit: William Park, resided in the State of Alabama. The Court overruled said showing, and propounders excepted. Propounders then excepted to the answer of Mrs. Dora Atkinson to the third cross-interrogatory as not sufficiently full. The question and answer are as follows: Q. "Answer if Mrs. Lucy Y. Deupree has not been to see you since the case has commenced, and had a talk with you and

John P. Atkinson, in order to refresh your recollections about these matters, and the order in which they occurred? Could you now say that Mr. and Mrs. Deupree actually left the room within your knowledge before the paper was signed by the witnesses? Did not Miss. Lutie King and Mrs. Deupree come out of the door first? Was the door wide enough for three persons to come out of the room together, and did you not hear Mrs. Deupree say after she got in the passage, 'I suppose you have no further use for me about this matter,' or words to that effect?" A. "She has been to see us and I have heard her converse on the subject. I do not think she came to see me for that purpose; Mr. Deupree and Mrs. Peebles left the room before the witnesses did, but I do not know whether or not they left the room before the witnesses signed the instrument. They all came out about the same time. The door was not wide enough for three to pass out at once. I did not hear her make that remark." The Court overruled the exception, and propounders excepted. The evidence in reference to whether the witnesses to the marriage articles, executed on May 24th, 1864, signed in the presence of Lewis J. Deupree, was conflicting. It was admitted that the estate of the testator amounted to some $300,000, and that the Athens real estate which had been conveyed shortly before his decease to his three daughters, was worth some $100,000. The Court charged the jury as follows:

"GENTLEMEN OF THE JURY: The propounders, as plaintiffs in this case, allege that the three papers before you, one dated in 1853, one in 1859, and one in 1864, constitute the will of Lewis J. Deupree. In relation to the execution of wills, (not nuncupative,) the Code declares that they must be signed by a testator of sound mind, freely and voluntarily, in the presence of at least three subscribing witnesses, and that these witnesses must sign in his presence. Unless all of these requisites are complied with there is no will. As to the paper bearing date in 1853, defendants concede the same

to have been properly executed. The same concession is made by them as to the codicil executed in 1859. They, the defendants, admit that these papers, executed in 1853 and 1859, would constitute the will of L. J. Deupree but for a subsequent event—his marriage in 1864. Caveators say that Mr. L. J. Deupree married in 1864, a fact admitted by propounders, and, under section 2441 of the Code, these papers, executed in 1853 and 1859, are revoked, and not the will of L. J. Deupree. This section (2441) declares that, in all cases, the marriage of the testator or the birth of a child subsequent to the execution of a will, in which no provision is made in contemplation of such an event, shall be a revocation of the will. Propounders, while admitting the marriage of L. J. Deupree, in 1864, and its legal results, reply to this ground of the caveators, that in 1864, a few moments before his marriage, L. J. Deupree executed a paper, called generally a marriage settlement, which is in some of its clauses testamentary, and that these testamentary clauses do actually make a provision in contemplation of marriage and birth of a child, and that, as a whole, taking the three papers offered for probate, L. J. Deupree's will made a provision in contemplation of marriage, and therefore his marriage in 1864 did not revoke his will. Upon an examination of this instrument, executed in 1864, I am satisfied that the parts thereof claimed by the propounders as testamentary, are so, and do make a provision in contemplation of marriage. I am satisfied that this paper comes up to the requirements of section 2441 of the Code, so far as the nature of its provisions is concerned, and, if properly executed, avoids the effect of marriage. And here I charge you that a writing not executed as our law requires in cases of wills, will not save the papers executed in 1853 and 1859 from the effect of marriage. You will, then, understand me to charge you that this paper, dated in 1864, though it is testamentary in its provisions, and though these provisions do contemplate the event of marriage, must be shown by proof to have been executed by L. J. Deupree, when he was of sound

mind, voluntarily, and that he signed it in the presence of at least three witnesses, and that they signed in his presence. There is no dispute on any of these questions, except as to the last—the subscribing of the three witnesses in L. J. Deupree's presence. In 33 Georgia Reports, 293, it is declared by our Supreme Court, 'that attesting and subscribing by witnesses in presence of the testator are essential to the validity of a will, and that these must be shown to have been done, else the will shall be held to be void and of no effect.' It is also said by the Court, on page 293 of 33 Georgia Reports, in same case, 'that it is not necessary for the testator to have actually seen the witnesses subscribe, but it was necessary that they should have subscribed in his presence, and that it must have been done before him, or in his view, so that if he would have looked from his actual position he might have seen the witnesses subscribe.' Should you be satisfied from the evidence that Mr. Deupree, from his actual position, when the witnesses subscribed the paper dated in 1864, might have seen them subscribe, then this paper is properly executed, and the three papers should be declared to be the last will of L. J. Deupree. But if he could not, from his actual position, have seen the witnesses subscribe it, then it is not properly executed, and your verdict should be against all of the papers. If the subscribing witnesses should not recollect where the testator was when they subscribed, and the attesting clause recites him present at that time, the presumption is that he was so present. If not, and the attesting witnesses appear in Court, and their testimony is that they do not recollect as to the presence of the testator, no such presumption arises. While I am in some doubt as to these propositions, when the subscribing witnesses do not remember where the testator was when they subscribed, still I charge you that the law is as I have stated. Even, however, if the witnesses do not remember distinctly, if you are satisfied, by the testimony of other witnesses and from proof before you of circumstances, that the will was signed by the subscribing witnesses in L. J. Deupree's pres-

ence, then the will should be established, as composed of the papers executed in 1853, 1859 and 1864."

The propounders excepted to, and assigned as error the following rulings of the Court upon the trial:

1st. That the Court erred in overruling the motion to continue, grounded upon the absence of the subscribing witnesses to the paper propounded, bearing date May 24th, 1864, as above stated.

2d. That the Court erred in overruling the exceptions to the answer of Mrs. Dorah Atkinson, as above stated.

3d. That the Court erred in holding Lucy Y. Deupree, the widow of the alleged testator, and who was a party to the paper propounded, bearing date May 24th, 1864, and which had been put in evidence, a competent witness, overruling the objection made by counsel for propounders, when each set of her interrogatories was offered, and allowed both sets of interrogatories to be read in evidence, when it had been shown that the said Lewis J. Deupree, the other party, was dead, and in this the propounders say the Court erred.

4th. Counsel for propounders profered the following writ ten request to the Court to charge: "That every revocation of a will, whether express, implied or resulting, statutory, positive or absolute, was, under the Code of Georgia, a question of intention; and that if the jury were satisfied that, cotemporaneous with the marriage of the said Lewis J. with the said Lucy Y., he executed the paper propounded, bearing date May 24, 1864, with proper formality for a deed, that such evidence will silence the presumption that by his said marriage he intended to revoke his will." Which said request the Court refused to charge, but charged "that the jury could in nowise consider said paper, unless they were satisfied under the evidence that it was executed with all the formality required by law for the execution of a will." And counsel for propounders say that the Court erred, both in refusing said request, and also in giving said charge, immediately above set forth.

5th. Counsel for propounders assign as error the following ssages from the charge of the Court: "You will, then, derstand me to charge you that this paper, dated in 1864, ugh it is testamentary in its provisions, and though se provisions do contemplate the event of marriage, must shown by proof to have been executed by L. J. Deupree, en he was of sound mind, voluntarily, and that he signed the presence of at least three witnesses, and that they ned in his presence." "But if he could not, from his ual position, have seen he witnesses subscribe it, then it is ; properly executed, and your verdict should be against of the papers;" and say that the Court erred in giving same.

3th. And counsel for propounders say that in the following urge: "If the subscribing witness should not recollect ere the testator was when they subscribed, and the attest- ; clause recite him present at that time, the legal presump- n is that he was present. If not, and the attesting wit- ses appear in Court, and their testimony is that they do recollect as to the presence of the testator at the time of esting, no such presumption arises. While I am in some ubt as to these propositions, when the subscribing wit- ses do not remember where the testator was when they scribed, still I charge you that the law is as I have ted. Even, however, if the witnesses do not remember tinctly, if you are satisfied by the testimony of other wit- ses, and from proof before you of circumstances, that the l was signed by the subscribing witnesses in L. J. Deu- e's presence, then the will should be established as com- ed of the papers executed in 1853, 1859 and 1864," the urt erred, and they assign the whole and each and every t as error.

LINTON STEPHENS; PEEPLES & STEWART; REID & BETON, for plaintiffs in error.

The propounders excepted, and assign seven errors, which will be severally set forth in the argument following:

1st. The witnesses to the paper of 1864, though subpœnaed, did not appear. Propounders moved for a continuance, which motion was refused. The witnesses resided out of the county; still we say their presence should have been compelled.

"By all the witnesses in existence and within the jurisdiction of the Court *or by proof of their signatures, and that of the testator, the witnesses being dead:* Code, 2389. Code, 3471, as to continuances requiring subpœna of witness residing in county, and Code, 2394, 2397, authorizing examination of witnesses to wills by commission—contra: the first is but a general clause from which this particular case is excepted; the other provides for testimony by commission on all other points than due execution, for Code, 2395, requires filing of the will; it must remain in the office—this is to preserve so important a paper. Code, 3784, requires subscribing witness called but in the therein excepted cases. Act of 1807, Cobb's Digest, 314—the preamble to the 1st section states that there is no law that sufficiently enforces witnesses to wills to prove the same. See Act of 1838, allowing probate in county of witnesses: Cobb's Digest, 285; Code, 2387.

2d. The interrogatories of Mrs. Deupree, the widow, were received, propounders objecting, to prove that her deceased husband was not present when the witnesses signed. The cause of action on trial was whether the will propounded should be set up. To this issue Deupree, by his representatives, was a party, and Mrs. Deupree was also a party against him by actually caveating the will, and Deupree, an original party, was dead. Leaptrot *vs.* Robertson, 37 Georgia, 587; see specially, 589, *ad finem.* See, also, Moore *vs.* Harlan & Hollingsworth, 37 Georgia, 626. "The reason for excluding a party whose opponent is dead is evidently because he cannot be confronted by the other party:" McGehee *vs.* Jones *et al.*, 41 Georgia, 125. Mrs. Deupree carries her contem-

plated husband out of the room swearing he did not stay behind long enough to witness the signing—he was not there to confront her. She joined as caveatrix.

3d. The Court charged in the sixth assignment: "If the subscribing witnesses should not recollect where the testator was when they subscribed, and the attesting clause recites them present at that time, the legal presumption is that they were so present. If not, and the attesting witnesses appear in Court, and their testimony is that they do not recollect as to the presence of the testator at the time of attesting, no such presumption arises." The attestation clause was "signed, sealed and delivered in the presence of." Suppose the charge to mean if the attestation clause does not recite the testator's presence at their subscription, and they cannot remember, when testifying, if he was present, no presumption of his presence arises—that was error. 1 Greenleaf's Evidence, section 38, (*a*) as to presumption in favor of due execution of solemn instruments. Also, 1 Williams' Executors, 83, as to clause omitting some essential particular, or clause omitted entirely. The paper was testamentary—it was attested by the three witnesses necessary—all these, taken with the clause, raised a presumption of Deupree's presence, which if not strong should have been given to benefit us as much as it legally could.

The Judge charged further as set forth in this assignment: "If the witnesses do not remember distinctly, if you are satisfied by the testimony of other witnesses, and from proof before you of circumstances, that the will was signed by the subscribing witnesses in L. J. Deupree's presence, then the will should be established as composed of the papers executed in 1853, 1859 and 1864."

1. The subscribing witnesses do not remember distinctly, and he therefore directed their finding improperly against evidence that might warrant a verdict, though not distinct and precise, and against the legal presumption. 2. He also virtually told the jury that they could not set up the will on

the testimony of these witnesses. 3. He intimated an opinion on their evidence. Though it raised the presumption of Deupree's presence at the attestation, still if they could not distinctly remember the fact which the law presumed, their evidence was insufficient. 4. In the seventh assignment the Judge in reply to verbal request of counsel that if Deupree was shown to have been present when witness began to sign, the legal presumption was that he continued present until the signing was finished, said such was, in his view, a presumption of fact. A presumption of fact is a mere argument, but the other must prevail if not rebutted. If Deupree was proven present when the signing of his own paper begun, the law will presume him staying the few seconds longer of the signing, and the Judge should not have said, even impliedly, that the jury could disregard this presumption: See Greenleaf's Ev. sec., 44. 5. The fourth assignment recites the refusal of the following request: "That every revocation of a will, whether express implied, or resulting, statutory, positive, or absolute, was, under the Code of Georgia, a question of intention, and that if the jury were satisfied that contemporaneously with the marriage of the said Lewis J. with the said Lucy Y., he executed the paper propounded bearing date May, 24th, 1864, with the proper formality for a deed, such evidence will silence the presumption that by the said marriage he intended to revoke his will." The Court charged instead, that such paper could not be considered by them unless it had been executed as a will. 1. Code 2434–42 makes but two sorts of revocation, express and resulting. One instance of implied revocation is the execution of a subsequent will inconsistent: Code, 2435. This implied revocation extends only so far as the inconsistency exists: Code, 2439. The doctrine is also applicable to conflict of clauses: Code, 2440. 2. The revocation in question is certainly resulting. It is classed by the legal authors as an implied revocation: See Williams & Jarman. That it comes here by a statute instead of a long-accepted formula, does not change the nature. Last-

l the instances of revocation given in the above cited ns are put on the same footing in the last: Code, 2442: a destroyed will was never revived by a codicil: Red- 365; Williams, 94. 3. This being a resulting revoca- it is within the words of section 2438: "In all cases of ation, the intention to revoke is necessary to make it ual;" and the two clauses should be read together, thus; ll cases the marriage of the testator, *with the intention oke, (animo revocandi)* subsequent to the making of a will hich no provision is made in contemplation of such an , shall be a revocation of the will," just as we must rec- e section 2438 with other clauses apparently as positive. he Act of 1834, as apparent from its title and its body, worked an *intestacy* in case of death, without alteration; ode makes the marriage a *revocation*. 5. There is no difficulty as has been imagined on the subject of inten- ; the intention concurring with the act, characterizes it; et cannot be altered in nature by a subsequent change tention. The doctrine seems to be this: subsequent iage being shown, revocation is presumed *prima facie*, s the same will be presumed when obliteration is shown; he presumption is disputable in each case and can be re- d. 6. Remember the conflict in England; read 1 Wil- ' Executors, 158-9; also, 4 Kent, 523-4, wherein he the strong ground of Lord Mansfield for intention in- of condition. 7. American authorities: Brush *vs.* Wil- 4 Johns. Ch., 506; Yerby *vs.* Yerby, 3 Call, 334; ler *vs.* Wheeler, 2 Rhode Island, 364.

The charge complained of in the fifth assignment ex- y excluded from the consideration of the jury, saving uestion of its execution as a will, the paper of 1864, h that paper was shown to have been executed as a deed. ame was virtually done by the Court as recited in the assignment. This cotemporaneous settlement really d the will. The object of the Act of 1834 was to modify: *vs.* Wilkins, which had ruled that birth and marriage

must concur to revoke and make either event a revocation. This was the great object. This Act, if not superseded, is still of force. (The heirs took the remedy given by it.) *Prima facie*, the Code merely intends to repeat it substantially, save that the Code makes marriage a revocation. (See Mr. Justice Cowen, quoted by Kent, first volume, side, 468, note (*d*)—read all.) Suppose Deupree had made a new will, bequeathing his wife $500; this would be an admitted alteration; but, when he passed to her $10,000 *in præsenti*, irrevocably, taking it forever out of the residuum, there is a quibble, and he has not altered his will. See Redfield, 294-5, and the comment on Kenebel *vs.* Scrafton, 2 East. 530, in the note citing Earl Ilchester, 7 Vesey, 348. In this case, a devise of land, the Chancellor says: "That from the rule originally adopted and now settled, whether to be considered a rule of law or a presumption, whether going upon the intention or an implied condition," etc., no revocation. (See third marginal note of reporter.) The Chief Justice and Master of Rolls agreed. Read the opinion of the Chancellor. The rule, whether it be one of intention or of absolute law, was never held to be applicable in any case where the revocation could not confer any benefit on the after-married wife or after-born children: 1 Jarman, 110; Sheath *vs.* York, 1 Vesey & Beames, 390; Brush *vs.* Wilkins.

R. Toombs, for the defendants. First Assignment: That the Court erred in overruling the motion to continue the case, founded on the absence of the subscribing witnesses. This ruling was not error. The witnesses did not live in the county where the issue was tried, but were admitted to be residents of other counties, and one of them resided out of the State. Those living out of the county could not be compelled to attend in person: Code, section 3788. Applications for continuance must show that the witness lives in the county: Code, section 3471. Interrogatories are allowed on probate of wills: Code, sections 2394, 3821–3. And the in-

rogatories of the absent witnesses were in Court and read propounders: Code, section 3480.

Second Assignment. That the Court erred in not sustaining the objections to the answer of Mrs. Atkinson to third ss-interrogatory. Reply—no error. Answer full and sufient. See bill of exceptions, pages 23 and 26, and Mott *vs.* all, Maer & Company, 41 Georgia, 117; 8th Georgia, 626, d objection immaterial if good.

Third Assignment. That the Court erred in overruling bjection to the testimony of Lucy Y. Deupree, because she as a party to the marriage articles, dated 24th May, 1864, nd which was one of the papers offered for probate, in part, s a will, it having been shown that Lewis J. Deupree, the ther party to said articles was dead.

We submit that Lucy Y. Deupree was a good witness under the Act of 1866: Code, section 3798, in this issue of *Devisavit vel non:* 1st. Because she is not within the exception. 2d. *The contract is not sued on.* 3d. She is not called n to testify *in her own favor.* Her interest in the contract, if any,) was not in issue: See 36 Georgia, 520; 37th, 624; 8th, 108. No objection having been made as to costs, she as a good witness at common law: Worrell *vs.* Jones. 1 reenleaf, sections 337, 338, and note to 337, section 254—1, reenleaf, 342, when judgment cannot issue against a party.

Fourth Assignment. This assignment rests on the single round that the marriage articles entered into before the last arriage, on the 24th May, 1864, executed with the formalies of a deed *only*, and not "with all the formalities required r a will," etc., but "the presumption that by his said marriage . J. Deupree intended to revoke his will." We will reply: t. That by the provisions of the Act of 1834, under which fendants in error filed their petition praying judgment of testacy as to the estate of said Lewis J., if this will of 1853-) was not *revoked* after the marriage of the parties, 24th of ay, 1864, it is void, and an intestacy must be declared un- r the said Act of 19th December, 1834: See Cobb's Digest,

367. This statute enacts that, "in all cases when a person, after having made a will, shall marry, (like provision for children omitted,) and no provision shall be made for the wife after marriage, *in said will*, and shall depart this life without revoking said will or altering it subsequent to said marriage, the proper Ordinary shall pass an order declaring such person died intestate." Here is marriage after the will of 1853–'59. Here is "no provision" *in said will* for the wife. Here is no alteration *in said will* subsequent to said marriage, and plaintiffs in error say, "no revocation." What follows? This law says, intestacy—Statute of Distribution. In this view, rebutting intention to revoke does not help plaintiffs in error. 2d. We reply: That this will of 1853–'59 is also void under section 2441 of the Code, because it declares that "in all cases the marriage of the testator, (or the birth of a child to him,) subsequent to the making of a will *in which* no provision is made in contemplation of such an event, *shall be* a revocation of the will. Under this statute we have will, subsequent marriage of testator, no provision *in said will* in contemplation of such event, therefore *revocation*—revocation by command of the law—and this and the next following section of the Code, 2442, in perfect harmony therewith, and therefore to be considered to contain the last expression of the legislative will on this branch of the law of wills.

To the plain requirements of these two statutes the plaintiffs in error oppose: 1st. The marriage articles, executed 24th May, 1864, purporting to make provision for the wife and after-born children, if any; and, 2d, section 2438 of the Code. To the first we reply, that both the statutes, (Act of 1834 and section 2441 of the Code,) require the provision for the wife and child to be made *in the will*, and not outside of it, or in any other manner whatever, and that there is no dispensing power lodged in the hands of testators by section 2438 of the Code, or elsewhere, to amend the plain provisions of these two Acts.

This Court has given a clear and accurate exposition of

his provision in the Act of 1834, in Holliman *et al., vs.* Copeland and wife, 10 Georgia, 79, and the point now under consideration being identically the same in both statutes, the decision equally applies to section 2441 Code, also to 2 Greenleaf's Evidence, section 684 and note; Bibb *vs.* Thomas; 2 I. Black, 1043; 1 Jarman on Wills, 106, 107, 108, 109, 10, 111, 112; 13 Williams' Executors, 165, 163: See 1 Williams' Executors, on point of time of intention, 162. For review of the whole doctrine in England, see Marston *vs.* Doe, *ex dem.*, Fox, 8; Adolphus & Ellis, 14 (35 Common Law, 343.) If the statutes of 1834 and section 2441 of our Code needed further interpretation on these points than their own explicit language and decision of our own Supreme Court, it can be abundantly furnished by referring to that cardinal rule of construction, the old law, the mischief and the remedy. The principle that marriage and the birth of a child after the execution of a will, under any circumstances, revoked it, was not provided for by the Statute of Frauds but were borrowed from the civil law, and became one of the most confused and perplexing branch of English jurisprudence, at least until the great case of Marston *vs.* Doe, *ex dem.*, Fox. What cases came within the rule, whether the rule was one of presumed intention to revoke by the testator, subject to be rebutted by extrinsic evidence of a contrary intention, or a rule of law which operated without regard to the intentions of the testator, whether, if it was a question of intention, that intention could be gathered only from intrinsic evidence, or if extrinsic, the intention at the time of making the will, or some subsequent intention, was the test of the application of the rule; whether marriage alone, or marriage and the birth of a child, was necessary to bring the case within the rule, whether the rule applied in the event of the death of the child before the testator, or in the event that the issue had other provision, by descent, by marriage settlement or otherwise; whether or not the rule would operate its application did not benefit the after-born child and in-

jure children by a former marriage; whether it applied to a single man with children by a former marriage. These, with various other vexed questions, besides the conflicts of the decisions between the Common Law and Ecclesiastical Courts, called loudly for legislative intervention. The Act of 1834, and the section, 2441, of our Code were the responses to that call. Nearly all, and perhaps all, the States of the Union, where the common law prevailed, as well as the Parliament of Great Britain, felt the same necessity for legislating on the subject, and have done so. Our Acts made it the marriage or the birth of issue, without provision *in the will* for the event, *ipso facto*, an annulment of the will. The plaintiffs in error invite you, by forced construction, to shut your eyes to the plain language and obvious purposes of these Acts, and again to plunge into and lose ourselves in the endless mazes from which we have happily escaped.

But it is insisted by plaintiffs in error that the 2441st section of the Code repeals, changes, or alters the Act of 1834. Suppose this be true; we stand upon the 2441st section of the Code, and have the same great facts: Will, subsequent marriage, no provision for it *in the will, revocation.*

This proves the Acts not inconsistent. To escape the Act of 1834 there must be *revocation*, or alteration; to escape the Code, there must be *no revocation.* Each seems to provide for a different state of facts, and, therefore, no conflict and no repeal. These conclusions are so clear that plaintiff admits, by his defense, that he must look elsewhere to escape their consequences; and, therefore, he says, for further plea and answer, that section 2438 of the Code modifies and controls the intepretation, both of the Act of 1834 and of section 2441 of the Code. This section, 2438, is not put forward as a modest equal of other laws, *in pari materia*, to be construed together in order to arrive at the meaning of the Legislature; but as an Aaron's rod, to swallow up all other rods. The intention of the Legislature, when ascertained by fixed rules of construction, is the life of the statute; the rule by which

citizen shall govern his conduct; it is the law to which
nust conform, and which he must obey. The *intention*
estators, in all cases, is the polar-star in the construction
vills—which shall govern, when not inconsistent with a
of law. The intention of contracting parties, in all
s of contracts, likewise, shall be the law of contracts, un-
it conflicts with a rule of law; "and in all cases of revo-
on, the intention to revoke is necessary to make it effect-
. This clause, like all the rest, has no other limitation
a rule of law, and the section is its own expositor; for
next and only remaining clause in the section gives the
osition, to-wit: "An express claim of revocation will not
rate upon a testamentary paper when it is manifest that
h was not the intention." See section 2434 to section
38 for further illustrations of the principle. All these
irm nothing but the rule of the common law. Sir H.
nner Faust, in Marston *vs.* Fox, says, at common law,
ntention is the principle of *factum* and of revocation. It
the principle of revocation, whether it be direct by act or
plied by circumstances, the animus *testandi* or *revocandi* is
governing principle." Quoted in Williams on Execu-
s, page 158, and note. Revocation by act of the party is
act of the mind demonstrated by some outward and visi-
sign, etc.: 1 Greenleaf, 573. The grand and only sensi-
rule is, that a testator's intentions designate and fix the
racter of his own act; while the intention of the Legis-
re as to this Act, when thus ascertained, is the law: equally
law in the making, the expounding, the execution and
ocation of wills. Intention governs contracts. Code, 2713,
9, 2689 and wills 2360.

But if the interpretation claimed by plaintiffs in error is
govern, at what time shall this intention be manifested?
say at the execution of the will, and not after: 10 Geor-
, 79; Marston *vs.* Doe, *ex dem.*, Fox; Israel *vs.* Rodan, 2
ore's Privy Counsel; 2 Greenleaf, 684 and note. Also, if
intiffs in error's interpretation is to govern, by what evi-

dence shall the intention be proved? We say none bu
dence which will amount to republication: Marston v
supra, Israel *vs.* Rodan, *supra;* 2 Greenleaf, 684 and
1 Jarman on Wills, 109.

This brings us to the fifth and sixth assignments,
being substantially the same, will be argued together.
stand solely, in the charge of the Court, on section 2
the Code upon the subject of republication. Assumi
the purposes of this argument, that a republication,
this section, would be a full reply to the Act of 18
section 2441, we say that the marriage articles, wheth
or will, "were not executed with all the formalities re
for a will," and, therefore, cannot operate, either as a
as a republication of a will; because, we affirm that t
requires a will to be signed by the witnesses in the p
of the testator: Statute of Frauds, Cobb's Digest, 1187;
sections 2379, 2442; Robertson & Wood *vs.* King, 6
gia, 539; Brooks *vs.* Duffie, 23 Georgia, 441; Reed v
ertson, 26 Georgia, 294; Lamb *vs.* Girtman, 33 G
293. The charge complained of in the sixth assignme
good law, but too good for plaintiff's case.

J. D. MATHEWS, for defendants. In the bill of exc
filed by the executors, there are seven assignments of

The first Assignment: Court erred in overruling mo
continue on the ground that two witnesses to the ma
contract, subpœnaed and living in Meriwether county,
absent. Reply: No error here. As to law of contin
see Code, section 3471; as to law for taking testim
witnesses residing out of county, see sections 2394 and
Besides, these absent witnesses were fully examined on
and cross-interrogatories, and their testimony was read
trial. Again, said contract not being testamentary i
part, was matter irrelevant to the issue: See, also, Cod
tion 3788.

Second Assignment: Court erred in admitting the a

of Mrs. Dorah Atkinson to third cross-interrogatory, objected to because not full. This is simply a mistake; interrogatory is fully answered.

Third Assignment: Court erred in holding Mrs. Lucy Y. Deupree a competent witness in the issue on the execution of the paper propounded, bearing date May 24th, 1864, she being a party to the same, and Lewis J. Deupree, the other party thereto being dead. Reply: Said paper was pleaded by the executors both as a contract and as a testamentary paper; Mrs. Deupree was examined as a witness to disprove its proper execution as a testamentary paper only. She was no party to said paper considered as testamentary; L. J. Deupree, the testator, was the only party thereto when so considered. Mrs. Deupree proved the proper execution of said paper considered as a contract. She was therefore a competent witness under Code, section 3798. Besides, said paper considered as a contract, was irrelevant: 1 Greenleaf, 338; Castello *vs.* Castello, 41 Georgia; 40 Georgia, 150, 490.

Fourth Assignment. Court erred in refusing to charge as requested, that every revocation of a will under the Code of Georgia is a question of intention; and if the jury believed, the marriage contract was properly executed, as a deed, then such contract rebutted the presumption that L. J. Deupree, the testator, intended by his marriage with the said Lucy Y. to revoke his will; and in charging that the jury could not consider said paper unless executed with the formalities of a will. Reply: Court was right. Section 2438 of the Code, which says, "intention to revoke is necessary to make it effectual," does not qualify section 2441, which puts the revocation there provided for on *events* or *circumstances*, as specified, and not on the intention of the testator to revoke, and make the revocation independent of the act or intention of the testator. These two sections being placed in the same "Article," and under the same head of "Revocation," does not make the former qualify the latter; the "classifications of the Code are not law, nor are they at all accurate:" 39 Georgia, 406–7.

There was no such qualification of the Act of 1834: Cobb's Digest, 347; 10 Georgia, 81–2. What the Code calls express, resulting and implied revocations were all express revocations under Statute of Frauds, as distinguished from implied at common law: Greenleaf, 2d volume, paragraphs 680, 684. That Act is not changed in this particular by section 2441. Rule for construing Code: It does not change the law "except where it plainly does so:" 38 Georgia, 5. The common law, as adopted from the Civil Code, put this class of revocations on implied intention to revoke, where it stood, with some doubts expressed as to the true principle in this class of cases, till the case of Marston *vs.* Doe *ex dem.* Fox, 35 Common Law Reports, 303, which held that the true principle of revocation was not implied intention to revoke, as formerly held, but tacit condition annexed to the right to make a will. See, also, Israel *vs.* Rodan, 2 Moore P. C. C., 51, and 1 Jarman on Wills, top page, 109, and note; Williams on Executors, 1st volume, top pages 164–168, 172–3–4. See "Revocation" Library Edition. The new Statute of Wills of 1838 forever settled the controversy in England, by putting this class of revocations on the event of *marriage* alone *subsequent* to the date of the will, independent of the intention of the testator. Williams on Executors, 1st volume, top pages 174–5; Jarman on Wills, 1st volume, 113–4. The Act of 1834 and section 2441 of the Code, settled the controversy in Georgia by putting the revocation on the *event* of *after* marriage or *birth* unprovided for in the will, without regard to the intention or act of the testator. Both the provision and the mode of its conveyance are declared; both are the objects of the statute, and both are fixed by it. The provision must be *in the will*, not out of it. This is the great source of controversy arising under the common law from implied intention, or from the amount, character or mode of the provision, is cut off by our statute. The language of said Act is, if "no *provision* shall be made *in said will*," etc., and the language of said section is, "a *will in which* no pro-

vision is made," etc. There is no ambiguity in these words, which are of common use, nor in the Act or section construed with reference to these words taken in their plain, obvious, ordinary signification, and they must be so taken and enforced. Code, section 4; 1 Kent's Commentary, 461–2; 1 Kelly, 171; 3 Kelly, 152–3–4–5–6; 10 Georgia, 70; 10 Georgia, 81–2; 41 Georgia, 58; 17 Georgia, 458; 18 Georgia, 131; Sturges *vs.* Crowninshield, 4 Wheaton, 202; 4 McL., 465; 5 McL., 178; Devereaux Circuit Court Reports, 158; Brightly's Federal Digest, page 816, number 63. See review of American Statutes and authorities in note to Williams on Executors, 1st volume, top pages 170–1–2—title, "Revocation,"—Library Edition. South Carolina, Louisiana, Connecticut and most of the other American States have enacted laws putting this class of revocations on *event*, independently of the act or intention of the testator; the Statutes of Connecticut and Pensylvania, and some other States, require the provision in contemplation of marriage to be in the will as our statute requires; that of New York requires it to be by will or settlement. See specially, Statutes of South Carolina, volume 5—1786 to 1814—page 107, section 10; Revised Code of North Carolina, page 611, section 23; Revised Statutes of Connecticut, 1849, pages 346–7, section 6; Revised Statutes of Indiana, volume 2, 1852, page 311, section 3; West Virginia Code, 1868, page 480, section 6; Revised Statutes of Maine, 1857, page 453, section 8; Revised Statutes of Rhode Island, page 358, section 10.

Fifth Assignment: Court erred in charging the jury that though the marriage contract was testamentary in some of its provisions, and contemplated the event of marriage, yet that it could not prevent the revocation unless executed with the formalities of a will, and that testator must have been able to see, from his actual position, the subscribing witnesses sign the same. As to witnesses signing in presence of testator, see 6 Georgia, 539; 26 Georgia, 625; 33 Georgia, 293. This charge was given with reference to the marriage con-

tract as it was pleaded by the executors, as herein before stated. See reply to fourth assignment of error.

Sixth Assignment. Court erred in charging the jury that, if the attesting clause to a will recites the presence of the testator when the subscribing witnesses signed the same, the legal presumption is that he was so present, though they should not be able to remember the fact when called as witnesses to prove the execution; but if the attesting clause does not so recite, no such presumption arises.

Reply: As the attesting clause in this case contains no such recital, the first part of the charge was irrelevant and harmless, though it erred in principle in favor of the executors. The latter part of the charge was correct in fact. The true rule of law is this: where the witnesses to a will, whether there be an attesting clause or not, when called cannot remember the facts of the execution, their signatures may be proved, as where they are dead, or abroad, and the whole question as to the proper execution submitted to the jury, as questions of fact, under all the circumstances of the case. This was done in this case: Phillips on Evidence, 3d volume, 450–1; 19 Johns, 386.

1. The verdict was according to the law and the evidence in the case, and must stand, even though the Court may have erred.

2. Court erred against caveators in holding that the marriage contract was testamentary in some of its provisions; whereas, it is not ambulatory in any part, as a will is during the life of testator, but is binding and irrevocable in all its parts, which make a provision in contemplation of marriage; and made, also, on a valuable consideration. There is no stipulation in it binding on Lewis J. Deupree which he could have changed or disregarded; and there is nothing in said instrument which makes a provision in contemplation of marriage or birth, but his own binding stipulations: Code, section 2434. "In order to make a paper testamentary, no power, right, interest or estate must pass from the donor to

the donee during life time of donor:" Cone's opinion, 3 Kelly 172.

3. If the marriage contract was executed as a will it could not be a republication of the will, for the will was not revoked when the contract was made. There is no such thing as the republication of an unrevoked will: Code, section 2442; Williams on Executors, 1st volume, top of page, 278, title, republication.

McCAY, Judge.

Whether the English rule, making the marriage of a testator and the birth of a child to him, a revocation of a previous will, under certain circumstances, was based upon a presumed intention of revocation, or whether it was based upon an implied condition attached to the will itself, is not, in the view I take of the great question in this case, material to be discussed. In either view of it, that rule was founded in the desire of the Courts that the wife and child should be provided for, and, in all the cases, the fact of provision or no provision in some way of a substantial character, was the pivot on which the result turned. In my judgment, the question under our Code turns upon entirely a different idea, and the reasonings and analogies of the English Judges are entirely inapplicable to it. Our Code, section 2441, is as follows: "In all cases, the marriage of a testator or the birth of a child to him, subsequent to the making of a will, in which no provision is made in contemplation of such an event, shall be a revocation of the will."

The revocation is, by these words, made to turn, not upon any provision made *for* the wife or child, but upon whether the testator, *by his will*, has made a provision *for such an event*. If, by his will he has done so, the will is not revoked; if he has not, it is revoked. It is immaterial whether this provision for the *event* is a provision for the benefit of the wife or child or not; it is enough if it is for the event. *If the provisions of the will* meet the requirements of the statute, it

is not revoked; if *they* do not, it is revoked. Whether the wife or child is provided for in some other way has *nothing* to do with it; the law, by its express, positive terms, makes it turn upon the provisions of the will.

The only questions to be asked are: 1st, Was the marriage or birth subsequent to the making of the will? 2d, Does the will make a provision for the *event?* If the first question must be answered in the affirmative and the second in the negative, the will must stand revoked, unless the Court has power to say and does say that it will alter or modify the law to meet a case that it may think a hard one.

It is pretty evident that Mr. Deupree did not intend to revoke his will by his marriage; but the difficulty is, (supposing this paper of 1853 to be his *last* will,) he has not expressed that want of intent in the legal way, to-wit: he has not, *by his will*, made a provision in contemplation of the *event.* The law has fixed that way and that way only, as the means by which such a want of intent shall be manifested; and the Courts have no more power to say he may do this in any other way than they have to say he may show his intent to make a will in some other way than in the way prescribed. Exactly such a fact, and exactly such a will as this section of the Code provides for here, exist. It is, in my judgment, therefore, revoked. But, if Mr. Deupree, in 1864, made an addition to his will, confirming it and making a provision *for the event* of his marriage, then, as this will consists of both these papers, his will is not revoked by his marriage.

I agree with the Court below that the paper executed in 1864 is testamentary in some of its provisions. It undertakes to provide for the disposition of certain of his property at his death, and it in express terms reaffirms his will made in 1853, by declaring that any children to be born to him shall take under said will, etc. And if that paper was executed as a will, then I am clear his will, his whole will—the paper of 1853, and the paper of 1864—was not revoked by his marriage. Not because the wife is provided for, but be-

ause Mr. Deupree has, in the legal way, declared his inten-
ion not to revoke his will, to-wit: by making provision *in it* in
ontemplation of the event of his marriage. The legal execu-
ion of this paper was a question of fact for the jury, under the
aw. Under the evidence it was, without doubt, signed and
itnessed by three witnesses, who subscribed their names there-
o as witnesses. The only serious question on the trial, on this
ranch of the subject, was whether the witnesses signed the
aper in the presence of Mr. Deupree. It was contended on
he trial, by one side, that Mr. Deupree was present, and by
he other that he was not; on this point there was a great deal
f evidence.

It is contended that the Judge, in his charge to the jury,
ave them an erroneous instruction in a matter material to
he determination of this point. It was said that, as the
itnesses all testified to the signature of the testator, and to
heir own signatures, and were unable, in consequence of the
apse of time, to state affirmatively that he was present when
hey signed, or that he was not present, there was a presump-
ion of law, from the fact of attestation, that the paper was
uly attested. That is, that it was attested as the law re-
uires such papers to be attested. The Court charged the
ury that such was the law, provided the *attestation clause*
tated or recited the presence of the testator during the sign-
ng by the witnesses; but if the attestation clause did not so
ecite, no such presumption arises, even though the witnesses
ail to remember affirmatively the fact of the presence or the
bsence of the testator. My brother Montgomery and my-
elf think the Judge erred in this charge.

The attestation clause is not a necessary part of the will.
A will is good, if properly proven, without any such clause:
Redfield on Wills, 1st volume, 238; Williams on Executors,
83. Our Code declares that there is no particular form pre-
cribed for a will: Section 2360. It must be signed and
itnessed as the law requires, and that is all. There is no
equirement that there shall be any attestation clause—much

less that that clause shall state and certify to all the necessary requirements: Code, section 2380. Whether a paper is a will or not depends on its contents, and not on what it is called, or considered to be, by either the witnesses or the maker of it: Code, section 2360. There is no question as to the general rule, that, on the death of the witnesses, or on the failure of their memory, the proof of the fact of execution begets a presumption that all the details of the fact were such as the law requires: 1 Greenleaf's Ev., section 38 (*a*); 1 Redfield on Wills, 237, 238, 239. And the positions laid down by these authors are well supported by the authorities: Croft *vs.* Parkhurst, 2 Strange's Reports, 1109; Heard *vs.* Joiner, 2 Comyn, 531; Clark *vs.* Donnorant, 10 Leigh, 22; Fatheree and wife *vs.* Lawrence, 33 Mississippi, 622.

These cases establish, also, that this presumption does not depend on the recitals in the attestation clause. The case in Mississippi was a case of a will, and the paper had no attestation clause, except the word "test;" and the Virginia case was, as is the case at bar, a paper claiming to be a will, with an attesting clause, like this: "Signed, sealed and delivered." It is clear to me, therefore, that it was error in the Court to say this presumption did not arise, unless the attesting clause stated the presence of the testator. In 2 Redfield on Wills, 35, it is said and even where there is no attestation clause, or it is defective, there still remains the presumption that all which appears upon the paper occurred in the order stated, and as the law requires it shall be done, * * * according to the maxim, *omnia praesumuntur site et solemniter esse acta donec probatur in contrarium.*

There are some cases of wills executed under powers, prescribing certain forms, when it has been held that the proof must show that the forms have been complied with; and even though the witnesses be dead, or cannot remember, the presumption of compliance does not arise, unless the will itself or the attestation clause so states: 1 Redfield, 238, 239. But I have not found a case of a will, made under the stat-

ute, where it has been held that the presumption arising from the fact of attestation is made to *depend* on the recitals in the will, or the attestation clause. Some of the cases say the presumption is stronger, if the fact be stated, but it exists even if there be no attestation clause, or if it be imperfect. See, also, Dean *vs.* Dean, 27 Vt.; Elhat *vs.* Elhat, 10 Allen; Lawrence *vs.* Norton, 45 Barbour.

As a matter of course, the presumption is stronger or weaker, according to any material facts connected with the case, and, if it was recited, this would strengthen it. But it is a wise rule of law that such a presumption should exist. How many wills do not come up for probate, until many years after the execution of them! Sometimes, the witnesses can only recognize their own hand-writing; sometimes they only remember the fact that the testator signed, and perhaps only that they signed. Who was present and all the other details, have passed from memory. To say that under such circumstances the will is not to be probated, would be a death blow to wills.

It is said, however, that the witnesses in the case at bar do not fail to remember, and that even if they do, there is such an abundance of evidence that the testator was not present as to have *required* the verdict against the propounders, had the law been given rightly. As this case is to be tried over again, and it is not fair to either party for this Court to discuss the *weight* of the evidence, I will only say, that for my part, I think there is evidence to justify a verdict either way, and that, in my judgment, the witnesses to the *will* do fail to *remember* what was the real truth of the case. The *inference* drawn by two of the witnesses from certain facts which they do remember, is not evidence. It is only opinion. It is not rememberance, but inference, which it was for the jury to infer or not, from the facts stated. The recollection of a witness, though it may be indistinct, is evidence for what it is worth, but his opinion, entertained now as an inference from certain facts which he does remember, is

not evidence. The presence or absence of the testator is a matter of fact, and is not to be proven by opinions, even though the facts be stated. I do not think either of the witnesses to the will does state as a fact that the testator was not present at the time they signed. One of the witnesses says he was present when he took the pen to sign, but all the rest is merely want of any recollection of either seeing him or not seeing him. As to the other evidence, as I have said, I do not think it fair to discuss it in detail. I only say that if the jury had been told there was a presumption of the presence of the testator at the time of the witnesses' signature, if they failed to remember the truth of either his presence or absence, it is possible they might have come to a different conclusion. Had this charge been given—I do not say the jury ought to have found one way or the other—I only say that in my judgment, a verdict in favor of his presence would not have come among that class of verdicts which this Court will declare illegal, and set aside. The evidence would not have demanded the verdict. It would not have been illegal for the jury to set up this paper as a will. Upon the other points made we are all agreed.

The witnesses cannot, under our law, be compelled to go out of their county: Code, 3788, 3471, 2394, 3821–3. And it was in the power of the parties, under the direction of the Court, to present the original paper to the witnesses by interrogatories. Nor was the Court in error in permitting Mrs. Deupree to be sworn. So far as this paper is a will, it is not a contract with her, nor has she any interest in it as such, since she has bound herself not to take anything from his estate. The answer of Mrs. Atkinson is, in substance, a reply to the natural import of the question; at any rate, if it fails, it is in very immaterial matters.

Judgment reversed.

MONTGOMERY, Judge, concurring.

Concurring, as I do, in the opinion of the Court, as delivered by Justice McCAY, except upon one point, I only deem it necessary to give the reasons for my dissent on that, contenting myself with a general approval of his opinion upon the remaining points in the case.

1. After much fluctuation in the English Courts, the rule, as finally settled, applicable to all wills made prior to 1838, (when the Statute of Wills was passed,) may be thus stated: The law attaches a tacit condition to all wills, that if the testator marry and have issue born of the marriage, subsequent to the making of his will, the will is revoked, unless provision is made in the will, *or otherwise*, for such issue, and if he devise only a portion of his estate, the condition does not attach. The following authorities, I think, establish the rule as above laid down: *Ex parte* Earl of Ilchester, 7 Vesey, jr., 348; Havens *vs.* Van Denburgh, 1 Denio, 27; Kenebal *vs.* Scrafton, 2 East., 530; 1 Redfield on Wills, 294–5; Brady *vs.* Cubit, 1 Doug., 31; Marston *vs.* Fox, 8 Adolph. and Ellis, 14; (35 E. C. L. R., 326;) see Brush *vs.* Wilkins, 4 Johns., 507. It will be seen, by reference to the foregoing authorities, that unless the *whole* property of the testator is devised, the will is not revoked; that if provision is made for future issue by marriage settlement, the will stands; that the tacit condition does not operate, unless he "leaves no provision for any child of the marriage," in the language of the Court, in Marston *vs.* Fox. Not that he must leave such provision in the will—an examination of the context shews that the Court means, that where property is not embraced in the will, out of which a suitable provision exists for the future issue, then, no revocation. A careful examination of this case of Marston *vs.* Fox, on which the defendants in error mainly rest their case, shews that the Court was very guarded in laying down the rule, so as not to overrule any preceding cases, except those which rested solely on the prin-

ciple enunciated by Lord Mansfield, in Brady *vs.* Cubit, that revocation or not, by subsequent marriage and issue, was a question of intention on the part of the testator, and might be rebutted by evidence. In the case, then, before the Court, parol evidence was sought to be introduced for that purpose; and this was rejected on an additional principle, to-wit: that to admit it for the purpose of establishing the will, necessarily involved its admission in rebuttal; and if admitted in rebuttal, it could be admitted in chief, and this would be contrary to the Statute of Frauds. The Chief Justice, in delivering the opinion of the Court, says, "It is a question whether such revocation shall be allowed to depend upon evidence of intention—that is, upon evidence of which parol declarations of testator may confessedly form a part, whilst the Statute of Frauds has anxiously and carefully excluded evidence of that nature, with respect both to the original making and the revoking of wills of land." See argument of Sir W. W. Follet, in Marston *vs.* Fox.

The revocation in Marston *vs.* Fox was placed upon the ground that there was no provision for the after-born child, either in the will or out of it. It may be added, that in Sheath *vs.* York, 1 Vesey & Beam, 390–1, it is decided that the revocation must inure to the benefit of the after-born child; otherwise, the will must stand. If this be law unrepealed, it applies to the present case, and would prevent the revocation. I, however, doubt the correctness of the decision, even at common law. If the principle be true, the death of the child, whose birth revoked the will in the life-time of the testator, would operate as a republication. If, then, the common law be as I have stated it, to-wit: that the will is not revoked when the after-born issue is provided for, either in the will or out of it, the next question for consideration is, to what extent have our statutes modified the common law?

2. The only Act of the Legislature of Georgia upon this subject prior to the Code, is the Act of December 19th, 1834.

This Act grew out of the contest in Richmond county, shortly before its passage, over the will of one Cormick, who made a will and afterwards married and had issue. The propounders and caveators were represented respectively by John Forsyth and Richard H. Wilde, both lawyers of high reputation. Both counsel conceded that the issue was one solely of intention. The idea that a tacit condition of revocation was annexed to the will by operation of law, under the facts, seems not to have occurred to either counsel as being the law of Georgia at that time. It will be remembered that the case of Marston and Fox was not decided until 1844—ten or twelve years after. Cormick's will was set aside. The result of the case, then, could have furnished to the Legislature no reason for altering the law from a presumption of intention to revoke to one of tacit condition of revocation. And I am informed by a gentleman of high position at the bar, who heard the case tried and is familiar with the history of the Act, that the sole object of its framers was to alter the common law to the extent of making marriage *or* birth a presumptive revocation, where there was no provision for the future wife or child, and to this extent only. Be this as it may, keeping in view the old law, the mischief and the remedy, and looking to the reason and spirit of the statute, it seems to me to alter the common law in but three particulars: 1st. By making marriage *or* birth of issue a revocation, unless the after-married wife or after-born children are provided for. It is immaterial, for the purposes of the present case, whether this revocation was by tacit condition or presumptive intention. 2d. A fair construction of the Act would seem to require a revocation, even where the will disposed of only a part of the testator's estate. 3d. The marriage or birth did not of itself revoke the will, but the Court of Ordinary was required to pass an order declaring an intestacy. It is true, the *words* of the Act require the provision to be made in the will. I will consider that in its order. It is said that the mischief intended to be remedied by the Act of 1834

was the conflict between the decisions of the Courts, both in England and this country, in interpreting the common law rule. Was not the mischief, rather, the unprovided condition of the subsequently married wife or after-born child, which condition presented a strong, equitable claim on their behalf for the protection of the law? There was no conflict of opinion as to whether it required both marriage *and* birth of a child to revoke a will, before the Act.

3. This Act remained in force until the adoption of the Code, when, as seemed to be conceded by counsel, it was superseded by section 2441, which makes subsequent marriage or birth a revocation, unless the will contain a provision in contemplation of such an event. But, so far as the issues involved in the present case are concerned, does not alter the Act of 1834. It is not by any means clear to my mind that this section, taken in connection with section 2438, does not indicate an intention on the part of the codifiers to adopt Lord Mansfield's rule of presumptive intention, and not that of tacit condition. Concede, however, that section 2441 adopts the rule as laid down in Marston and Fox, does it follow that the provision for the subsequent wife or child must appear *in the will?* The *words* of the section, taken literally, seem to require it. But is it a sound rule of construction to adhere so closely *in litera*, and entirely ignore the reason and spirit of the Act? Would any one hold that a will in execution of a power is revoked by subsequent marriage or birth under the section? And yet the *words* of the section make no exception. A will of a woman was revoked by her marriage, at common law, absolutely, without reference to provision in contemplation of the event; and yet a will made by her in execution of a power was not so revoked. Suppose the strict construction so insisted on by counsel for defendants in error had been applied to the Statute of Frauds, what would have become of the rule on which their whole case rests? The sixth section of that Act provides, "no devise in writing, of lands, tenements or hereditaments, or any

clause thereof, shall at any time be revocable otherwise than by some other will or codicil, in writing, or other writing declaring the same, by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn or obliterated by the testator, or his direction, in manner aforesaid, or unless the same be altered by some other will or codicil, in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same, any former law or usage to the contrary notwithstanding." This section not only points out the specific modes in which a will may be revoked, (among which subsequent marriage and birth of issue are *not* mentioned) but declares that all wills "shall remain and continue in force" until revoked as therein pointed out, and yet the Courts have held, in the teeth of the words of this statute, that marriage and birth of issue revoke a will. Is it not safe to adhere to a uniform rule of construction in interpreting statutes *in pari materia?* Can any reason be given why the provision for the future wife and child should appear in the will? Counsel have failed to point out any, other than such is the letter of the statute. They have shown good reasons why the rule, as laid down in Marston and Fox, should be preferred to that of Lord Mansfield. And without being altogether satisfied that our Legislature did not intend to adopt Lord Mansfield's rule, I have assumed that our law annexes a tacit condition of revocation to a will on subsequent marriage of, or birth of issue to the testator, where the future wife or child is not provided for. But I have failed to perceive that our law, unlike the common law rule, requires the provision to be made in the will, and only there. Again, Code, 1767, requires all marriage settlements to be liberally construed to give effect to the intention of the parties. If we hold this will revoked, we render of none effect the provision made in the settlement for

the after-born children, for that depends on the validity of the will. So that we destroy a provision made for after-born children by a rigid and literal construction of an Act which was intended to secure provision for them. This anomaly should be avoided if possible. The fact that no after-born children sprang from the marriage under consideration, cannot alter the principle. Suppose instead of owning the property, the testator had had a life-interest, with power of disposition by will, and remainder in the children by his first marriage, if he died without exercising the power. Having made his will, and then by marriage settlement provided for his subsequently married wife, and opened the will in favor of the possible issue of the last marriage, so as to put them upon an equal footing with his other children under the will, he might well have reposed in the belief that he had fully provided for all his children, had issue sprung from the last marriage. And yet, the construction now put upon the Act would, in the case supposed, defeat the plain and obvious intention of the Legislature, and so distort the statute as to deprive those of the benefit of it for whose sole advantage it was passed. Nay, more, the statute becomes a sword to pierce instead of a shield to protect.

4. Hence, I dissent from the views of the majority of the Court on this point, and believe a provision by marriage settlement for the future wife and after-born children is a compliance with the condition annexed by law to the making of a will, and prevents revocation.

5. That presumption of proper execution of a will arises from the signature of the testator, and the fact of attestation by the witnesses, without reference to what may be recited in the attestation clause, where the witnesses do not distinctly remember, see Hand *vs.* James, 2 Comyn, 531; Croft *vs.* Poullet, 2 Strange, 1109; Boyse *vs.* Smith, 1 Willis, 1; 10 Leigh (Virginia Reports), 22; Redfield on Wills, 238, note.

WARNER, Chief Justice, dissenting.

On the 27th of June, 1853, Lewis J. Deupree made his will, and, on the 8th of September, 1859, he made a codicil thereto. On the 24th of May, 1864, he married Lucy Y. Peebles. Prior to said marriage, an ante-nuptial contract was made between the parties, securing to his intended wife all the property she then had, and settling upon her the sum of $10,000; in consideration of which, it was covenanted and agreed that the will of said Deupree should stand, and that she would not caveat the same, and provided also that if any children should be born after said marriage that they should take an equal share under his will with his other children named therein. The will, codicil and deed of marriage settlement were all propounded for probate, as the last will and testament of the testator, to which the widow and children of Deupree by a former marriage filed their caveat on the ground that the original will and codicil were revoked by the subsequent marriage of the testator, and that the paper offered as a testamentary paper, dated the 24th of May, 1864, was not attested and subscribed by the witnesses thereto *in the presence of the testator*, and therefore could not operate as a will. On the trial of the case, the jury found a verdict in favor of the caveators, and that Deupree died intestate. Exceptions were taken to the rulings and charge of the Court, upon several grounds, which are assigned as error here: First, the refusal of the Court to continue the case. Second, that one of the interrogatories put to the witness Dorah Atkinson was not fully answered. Third, that Mrs. Deupree was not a competent witness. Fourth, that the Court erred in charging the jury as to the legal effect of the attestation clause to the paper dated the 24th of May, 1864, and in the general charge as to the law in regard to the revocation of the testator's will.

The motion for continuance was properly overruled by the Court. The witnesses did not reside in the county in which

the trial was had, and, under the general law of the State, were not compelled to attend the Court in another county. If the propounders of the will had desired to attach the original will of the testator to interrogatories to be exhibited to the witnesses, the Court, on a proper showing, would have granted an order for that purpose, as is the usual practice of the Courts, when it becomes necessary to prove the *factum* of a deed, or other instrument, filing a copy thereof in the Clerk's office: Code, sections 3748, 3471, 2394, 3821, 3480. The interrogatory put to Mrs. Dorah Atkinson was substantially answered by her: Mott *vs.* Hall, Maer & Company, 41 Georgia Reports, 117. Mrs. Deupree was a competent witness: Brown and wife *vs.* Carroll, 36 Georgia Reports, 568. The law requires that a will should be attested and subscribed by at least three witnesses, in *the presence of the testator*, and the question made on the trial was, whether the paper writing, dated 24th May, 1864, propounded as a will, had been attested and subscribed by the witnesses, in the presence of the testator, so as to make it a valid will. The attestation clause to the paper recited that it was signed, sealed and delivered in the presence of the three witnesses, but did not recite that it was attested and subscribed by them *in the presence of the testator*. If the attestation clause had so recited, then the legal presumption would have been that it was attested and subscribed by the witnesses, in the presence of the testator, in the absence of any evidence to the contrary thereof. The point in the case was not whether the testator signed, sealed and delivered the paper in the presence of *the witnesses*, but did the three witnesses attest and subscribe the same *in the presence of the testator;* the attestation clause does not recite that they did, and, therefore, the attestation clause furnishes no legal presumption as to *that fact*, and there was no error in the charge of the Court, in relation to that point in the case, of which the propounders of the paper have any legal right to complain. The attestation clause does not recite that the witnesses attested and subscribed the paper *in the presence*

of the testator, so as to raise the legal presumption therefrom that they did, which was the material fact to be established, either by presumption or affirmative evidence. The evidence in the record upon that point in the case fully sustains the verdict and rebuts the legal presumption contended for, if there had been any foundation for it in the attestation clause, as claimed by the propounders of the paper. The evidence in the record upon that point in the case was such as to *require* the verdict which the jury found, setting aside the paper writing propounded as a will, dated 24th May, 1864. That paper being out of the way as a will, the next question to be considered is, whether L. J. Deupree died intestate, according to the laws of this State; in other words, whether his will, made prior to his marriage, was *revoked*. There is no provision made in the will of the testator in contemplation of such an event. The 2441st section of the Code declares, that, "in *all cases*, the marriage of the testator, or the birth of a child to him, subsequent to the making of a will, in which no provision is made in contemplation of such an event, *shall be a revocation of the will.*"

But it is said that it was not the intention of the testator in this case to revoke his will; that is undoubtedly so, and the question is, which is to control *the intention* of the testator or the *public law of the State?* There can be no doubt as to the plain meaning and intent of the law, and when the intention of the testator is in conflict with the law, that intention must yield to the stern mandate of the law. The 2437th and 2438th sections of the Code relate to *the acts* of the testator himself, and as to what was his intention in the performance of those acts in regard to the revocation of his will. The *acts of a testator* in regard to the revocation of his will and what was his *intention* in the performance of those acts is one thing; the declared will of the supreme power of the State as to what shall constitute the revocation of a testator's will, is another and quite a different thing—the one is controlled by the testator's *intention*, the other is

controlled by the law of the State without any regard to the testator's intention. The *intention* of testators cannot override the law or repeal it.

In this case there are no children born subsequent to the marriage, and the widow is estopped by her ante-nuptial contract from claiming any part of the testator's estate in the event of a revocation of the will, but that does not alter the law. The children of the testator, born before making the will, his heirs, are not estopped from claiming the benefit of the law, and are now before the Court demanding its judgment, that an intestacy shall be declared in their favor, on the ground that the testator married after making his will, in which no provision is made in contemplation of such an event. The law is in their favor, and they are entitled to have it administered by the Courts and an intestacy declared in obedience to the requirements of that law: Holliman *et al. vs.* Copeland and wife, 10th Georgia Reports, 79. The law, as prescribed by the 2441st section of the Code in relation to the revocation of a testator's will, is a public law of the State, *an universal rule* that regulates the conduct of the whole community, including the testator as well as all other persons. It declared to him in plain, explicit terms, that if he made a will in which no provision was made, in contemplation of the event of a subsequent marriage, and after the making of such will, he should marry, that such marriage should be a *revocation* of his will. The testator could not alter or change this rule of law by his compact or agreement. "The language of a compact is, I will or will not do this; that of a law is, thou shall or shall not do it:" 1 Bl. Com., 45. The design and object of all laws is to ascertain what is just, honorable and expedient, and when that is discovered by the law-making power, it is proclaimed as a general rule of conduct, equally binding and impartial to all. The Judges of the Courts are not "chartered libertines," to defeat and destroy the effect of a plain constitutional law by *construction* to suit their notions of expediency; their duty

is to administer and enforce it, when its terms and meaning are clear and explicit.

The real question in this case is between the children of the testator by a former marriage, legatees under the will, who are caveators, and the propounders of the will. They allege that the will was revoked by the marriage of the testator subsequent to the making of the will, in which no provision was made in contemplation of such an event, and pray that an intestacy may be declared by the judgment of the Court. Have *they* the legal right to have the will of the testator revoked and an intestacy declared in their favor, under the public law of the State? That the will was made by the testator before his marriage with Mrs. Peebles is an undisputed fact; that no provision is made in that will in contemplation of such an event is also an undeniable fact. What is the law applicable to this statement of facts? The Code declares that, "In *all cases*, the marriage of the testator subsequent to the making of a will in which no provision is made in contemplation of such an event, *shall be a revocation of the will.*" But it is said this law was not intended for their benefit, but for the benefit of the wife, and children born of the second marriage. The reply is, that the law is general in its terms, and declares what shall be a revocation of a testator's will, and if the will is revoked by the commandment of the law, the children who are the legatees of the testator under that will may claim the benefit of that law if it is their interest to do so. It was the intention of the General Assembly in the enactment of the law to establish a fixed and definite rule in regard to the revocation of wills in case of marriage or the birth of a child subsequent to the making of a will by the testator, so as to avoid all future controversy in relation to that question.

The decisions of the Courts in England, and in this country, were conflicting as to the proper construction of the common law rule in relation to the revocation of wills by the subsequent marriage of the testator and birth of children.

That was *the mischief* which the Act of 1834, substantially embodied in the Code, was intended to remedy, and it is the duty of the Courts to enforce it so as to suppress the mischief and advance the remedy, and not to *perpetuate* the mischief by going behind the Act to find the proper rule of construction in such cases, when the Act plainly declares what the rule shall be.

The law does not interfere with the right of a testator to dispose of his property by will—it simply declares to him, that if he marries after making his will, in which no provision is made in contemplation of such an event, that will *shall be revoked*, and he must make another if he desires to dispose of his property by will. In other words, he must regulate his conduct in obedience to the public law of the State in relation to that matter.

The law, as prescribed by the Supreme power of the State, was a rule of conduct for this testator as well as all others, and he could not defeat its general operation by his compact or agreement, whatever may have been his intention. In my judgment, the children of the testator by his former marriage, his heirs, have the clear, undoubted legal right, under the public law of the State, to have the judgment of the Court in favor of a revocation of the testator's will, and that he died intestate, under the statement of facts disclosed in the record, and that the judgment of the Court below should be affirmed.

Judgment affirmed.

DRURY B. CADE, plaintiff in error, *vs.* ABRAM BURTON *et al.*, defendants in error.

In an action for false representation, by which the plaintiff was damaged, if the representation be by deed, so that the defendant is estopped from denying the fact, he may yet show that the plaintiff knew the truth, for the purpose of fixing a time when the right of action accrued, and the

Statute of Limitations commenced running against the plaintiff's claim, it appearing that the plaintiff was seeking to avoid the statutory bar by showing that he had not discovered the fraud until long after the same was committed.

Evidence. Statute of Limitations. Fraudulent representations. Estoppel. Before Judge ANDREWS. Elbert Superior Court. March Adjourned Term, 1871.

Plaintiff in error filed his bill against defendants in error, in which he alleged that, in the year 1847, negotiations were pending between complainant and Abram Burton, which resulted in the purchase of a certain tract of land; that said Burton, in his deed to complainant, used the following language in the description of the land: "There is a disputed line or boundary between John D. Watkins and myself on the west of my tract, running out from Broad river, which I, the said Burton, exempt and exclude from the warranty, and leave that line and boundary to be adjusted by the said Cade with the said Watkins, without recourse on me;" that the truth was that said Burton and Watkins had agreed upon the line before the sale to complainant, which deprived him of a valuable portion of the land which he supposed he was purchasing; that, subsequently, Burton purchased the Watkins tract and could then have arranged with complainant said boundary line; that he failed so to do, and sold to the defendant in error, Uriah O. Tate, conveying the disputed tract. Complainant prayed that the line represented by said Burton to complainant, as the correct boundary, be decreed to be such, or that said Burton be decreed to pay to complainant the value of the disputed tract, with compensation for its use.

The jury found in favor of defendants, whereupon plaintiff in error moved for a new trial, upon the following, among other grounds: Because the Court erred in ruling that although the recital in the deed from Burton to Cade, (that there was a disputed line or boundary, etc.,) estopped said

Burton, yet, that he might prove facts contradicting it, and notice to Cade of the contradictory facts, in order to fix the time of discovery of the fraud, and, consequently the point from which the Statute of Limitations commenced to run.

The Court refused a new trial, and plaintiff in error excepted.

ROBERT TOOMBS, for plaintiff in error.

J. D. MATHEWS, for defendants, cited Code, section 2880; 35 Georgia Reports, 282; Code, section 2169, 2170; 1 Parsons on Contracts, 65–66; 3 Sugden on Vendors, 318; 2 Kent, 629, 630.

MCCAY, Judge.

The defendant in this case had pleaded the Statute of Limitations; and the plaintiff, admitting that he was *prima facie* barred, undertook to show that the knowledge of his right of action had not come to him within the statutory period.

We recognize the rule that the defendant was estopped from denying his deed, so as to defend himself from the plaintiff's *cause of action;* he cannot show that he did not say what is in his deed. He is estopped from doing this. He cannot deny that the plaintiff *had* a cause of action against him. But it seems to us that this is a very different thing to what the Court permitted him to do, to-wit: to show that the plaintiff knew he had a cause of action far sooner than the plaintiff claims. In other words, all he was permitted to do was to show, not that his deed was not true, but that the plaintiff knew that it was not true, and failed to bring his action within the time prescribed by law, and that a legal presumption, therefore, exists that the right of action has, in some way, been satisfied.

It is a frequent occurrence, in jury trials, that evidence is admitted for one purpose only, though it often happens that, if it is to be taken for true, the mind can hardly fail to give it

ght, through all the issues in a case. But this is a neces-
from the nature of jury trials. The remedy for it is
as done in this case, to instruct the jury that they are to
it no weight, except for the purpose indicated.

he sayings of a person in possession of land, that it is
are admissible to show adverse possession. So it often
ens that the acts of a party and his sayings are admis-
, not to establish their truth, but to show that the party
ght so.

'e do not think the Judge violated any rule of law, in
itting this proof. The jury were informed that they were
to consider it for one purpose, to-wit: as to its bearing
he Statute of Limitations. For any other purpose it was
before the jury. The estoppel was allowed its full
t.

; is admitted in the argument that, if this evidence was
erly admitted, the verdict of the jury for the defendant
n accord with the evidence, since they had a right to
eve it, and if so, the action was barred.

udgment affirmed.

GARET E. FISCHESSER, plaintiff in error, *vs.* JOHN THOMPSON, defendant in error.

pplication of a widow to the Ordinary for her twelve months' sup-
t out of the estate of her deceased husband, should be made by
ition, in writing, and notice given to the representative of the estate,
here be one, and the order of the Ordinary should always recite the
nes of the persons notified:

That when a judgment of the Ordinary, allowing to a widow her
lve months' support was presented in the Superior Court, claim-
money as a debt of the highest dignity against the claim of a
gment creditor of the deceased, that it was competent for such
gment creditor to attack the judgment of the Ordinary, and that
much as it was not recited in the order and judgment of the Ordi-
y that the representatives of the estate had been notified, and the

provisions of the law had been complied with, that the judgment of the Ordinary, allowing the widow her twelve months' support, was void as against the judgment creditor of her deceased husband, who had no notice of her application through the legal representatives of his estate or otherwise. McCAY, Judge, dissenting.

An amendment to a former proceeding, had before the Ordinary, by an order *nunc pro tunc*, will only be allowed on petition, in writing, and notice to the opposite party in interest. (R.)

Year's support. Amendment *nunc pro tunc*. Garnishment. Pleadings before Court of Ordinary. Before Judge ANDREWS. Elbert Superior Court. March Adjourned Term, 1871.

For the facts of this case see the opinion.

J. D. MATTHEWS, for plaintiff in error.

ROBERT TOOMBS, for defendant.

WARNER, Chief Justice.

This case came before the Court below on a motion to distribute money raised under a judgment against a garnishee who was indebted to J. B. Fischesser, deceased. The judgment against the garnishee for $1,000, was rendered at the September Term of Elbert Superior Court, 1870. The contest was between the judgment creditor of Fischesser and his widow, who claimed the money in Court under the judgment of the Ordinary of Oglethorpe county, allowing her $1,200 for her year's support out of the estate of her deceased husband, as a debt of the highest dignity. On the hearing of the case, the Court below decided that the judgment of the Ordinary, allowing the twelve months' support to the widow was null and void, and refused the motion to pay the money over to her, whereupon the counsel for the widow excepted. The record of the proceedings and judgment of the Ordinary of Oglethorpe county was offered by the widow and read in evidence to the Court, by which it appears that on

he 4th day of June, 1869, the Ordinary appointed five commissioners to set apart twelve months' support for the widow ut of the estate of her deceased husband; that on the 28th f July, 1869, the commissioners made their return, stating hat they had allowed the widow for her year's support the um of $1,200, which was filed in the Ordinary's office 21st ugust, 1869, and recorded 24th February, 1870. It does ot appear on the face of the proceedings had before the Orinary, that the application of the widow for her twelve onths' support was made by a petition, in writing, or that ny *notice* of such application was ever given to the executors of Fischesser.

On the 31st May, 1871, the Ordinary, at Chambers, ordered an amendment to be made to his former order, *nunc ro tunc*, so that it should recite that due and legal notice of he application for the twelve months' support had been given o one of the co-executors of Fischesser, inasmuch as it was mitted to have been recited in the first order by inadverance. The facts, as disclosed by the record, present two quesions for our consideration and judgment. First, whether the udgment of the Ordinary, setting apart the twelve months' upport to the widow, as it was first made, was a valid judgment, under the laws of this State; and, second, if it was ot, whether the *nunc pro tunc* order of the Ordinary cured it, and made the original judgment valid, as against the ights of the judgment creditor, claiming the money under his judgment. By the 2530th section of the Code, it is made he duty of the Ordinary, on the application of the widow, n *notice* to the representative of the estate, to proceed to apoint appraisers to ascertain and set apart a twelve months' upport for the widow and children of deceased testators or ntestates. The appraisers must make their return within hree months from the date of their action, to which return bjections may be filed, by any person interested, within six onths after filing the same in office, and if no objections are ade, or if made are disallowed, the Ordinary shall record

the return so made in a book to be kept for this purpose: Code, 2532. When all has been done which the law requires to be done, then the Ordinary may issue a writ of *fieri facias* against the representative of the estate for the amount awarded to the widow: Code, 2536; and has also power to enforce obedience to all *lawful* orders by attachment for contempt: Code, 4050.

We have seen that, by the 2530th section, the widow may make her application to the Ordinary for her year's support, on giving *notice* to the representative of the estate, if there be one. But in what manner is that application to be made? The 4043d section of the Code answers that question when it declares that, "Every application made to the Ordinary for the granting of any order, shall be by *petition, in writing*, stating the grounds of such application, and the order sought." This same section also declares that, if *notice* of such application is necessary, under the law, the Ordinary shall cause a copy of such application, together with a *notice* of the time of hearing, to be served by the sheriff, or some lawful officer, upon the party or parties to be notified, at least ten days before the hearing, and an entry of such service made on the original. The 4044th section declares that, the order of the Ordinary shall always *recite the names of the persons so notified*, and the compliance with the provisions required. There can be no dispute that, under the laws of the State, as the same are plainly written, that the widow, when she made application to the Ordinary for her twelve months' support out of the estate of her deceased husband, should have made that application by petition, *in writing*, and have *notified* the representative of the estate of such application. The executors of this estate were the representatives of the creditors thereof, and notice to them would have been notice to the creditors, but if no notice has been given to the executors, then the creditors have had no notice, and no opportunity allowed them to contest the widow's application for her twelve months' support; they have never had their day in Court as to that

r, and it is now sought to bind them by a judgment, to
. they were not parties or privies, and have had no op-
nity to contest it before the Ordinary. The law is right
tands, and was intended to provide against the extrav-
allowance for a year's support to the widow, to the ex-
n of the rights of creditors, and ought to be enforced,
to prevent the absorbing of dead men's estates, in grant-
nreasonable amounts for the year's support of their wid-
nd children.

the year 1856, the General Assembly passed an Act
ng the Courts of Ordinary in this State, Courts of gen-
jurisdiction, and it then became necessary to provide
ll applications for the granting of any order should be
tition, in writing, and notice given in all cases where
w required notice, which is now required by the Code
done. Although the Courts of Ordinary are declared
Courts of general jurisdiction, still, the law requires
certain *material facts* shall always be recited in the or-
and judgments of that Court. When it appears on the
of the record of a judgment of a Court of general juri-
ion that the Court had jurisdiction of the *person* and
ubject matter, in the manner prescribed by law, then,
egal presumption is that everything was proved that was
sary to authorize the rendition of the judgment. The
ment of a Court having no jurisdiction of the *person* and
ct matter, or *void for any other cause*, is a mere nul-
and may be so held in any Court where it becomes ma-
l to the interest of the parties to consider it: Code,
. The legal presumption is always in favor of the judg-
of a Court of general jurisdiction, but if the record of a
ment of the Superior Court should be presented, and it
ared on an inspection of that record that there was no pe-
and process, requiring the defendant to appear in Court,
no service on the defendant, or waiver of service, and no
e given to him of the pendency of the suit, will it be
nded that such a judgment would be binding upon the

defendant therein? The general presumption of the legality of such a judgment is rebutted by an inspection of the record, which the plaintiff himself offers, unless defendants are to be bound by judgments rendered behind their backs, without authority of law, and of which they have had no notice or opportunity to make their defense.

In the case now before the Court, the claimant offered the record of her judgment for her twelve months' support as the evidence of her right to the money, as against the judgment creditor of the testator, and the Court inspected the record of that judgment, and saw therefrom that she had not complied with the law, so as to entitle her to the judgment; that no notice had been given to the proper parties, inasmuch as the law required that the names of the persons notified should be recited in the order or judgment of the Ordinary. The argument is, that the Court was bound to presume that all the requirements of the law had been complied with, when the record of the judgment before it plainly showed that they had not; in other words, that the Court was bound to presume against the plain facts of the case, as exhibited in the record before it. The general legal presumption in favor of the judgment was rebutted by the record offered in evidence. It was clearly apparent on the face of the record of the judgment, that the application for the widow's twelve months' support was not made as required by the law, and no notice given as required by law, and the judgment creditor of Fischesser was not bound by it, he had never had his day in Court or the opportunity to have been there, when the judgment was rendered by the Ordinary, either by himself or the executors of the estate, who represented his interests therein. To have authorized the Ordinary to take jurisdiction of the widow's application for her twelve months' support and award a legal judgment therefor, that application should have been made to him by petition, in writing, and *notice* thereof given to the executors of the estate, as the law required him to do, and then the judgment would have bound

creditors of Fischesser, because the executors represented
m; but inasmuch as the Ordinary did not obtain jurisdic-
ı of the person and the subject matter, as prescribed by
, but rendered the judgment without authority of law, *no*
ice being recited therein to the legal representatives of the
ıte, the judgment rendered by him allowing the twelve
nths' support to the widow was void, as against the judg-
ıt creditor of Fischesser, and he might attack it whenever it
ıe in conflict with his rights in any Court. Creditors may
ick a judgment for any defect appearing on the face of the
ord or pleadings, whenever and wherever it interferes
h their rights, either at law or in equity: Code, 3538.
If the setting apart of the widow's twelve months' support
s conferred upon the Ordinary by a special provision of
law, then that special provision of the law conferring that
isdiction, both as it regards the person and the subject
tter, should have been complied with to authorize the Or-
ary to render a judgment under the authority of that
. It is true, that if the judgment alone had been pro-
ed without more (considering it a Court of general juris-
tion) the legal presumption would have been in favor of
judgment, but when the record and proceedings of the
dinary rendering the judgment under the special provis-
s of the law in question, clearly shows that the applicant
not make her application before the Ordinary in the man-
prescribed by law, so as to authorize him to take juris-
tion of the subject matter, and no notice given to the per-
whose rights were to be affected by it as prescribed by
, that legal presumption in favor of the judgment is re-
ted so far as the rights of the judgment creditor claiming
money as against that judgment of the Ordinary is con-
ıed, inasmuch as the law which confers the authority upon
Ordinary in this particular class of cases to render a judg-
ıt, expressly declares, that the order shall always recite
names of the persons notified, and the compliance with
provisions required by law. The claimant's own evi-

dence, offered in support of her right to the money under the judgment of the Ordinary, clearly shows that she is not entitled to it as against the judgment creditor, because the Ordinary did not acquire the jurisdiction to render that judgment in the manner prescribed by law, so as to conclude his rights, even if it should be conceded that the judgment of the Ordinary is the judgment of a Court of general jurisdiction, in regard to this particular class of cases. When the law requires that certain specific things shall be done to give a Court jurisdiction, either of the person or the subject matter, and the record of the proceedings and judgment of that Court do not show upon the face thereof that those certain specific things have been done, which the law positively requires to be done, to confer jurisdiction, and especially when the law requires that those certain specific things shall be recited in the judgment of the Court, and that there has been a compliance therewith, and the record does not affirmatively show that these things have been done, upon an inspection of the entire record offered, the legal presumption contended for in favor of the judgment should not be allowed to prevail so as to affect the interest of those who, under the law, were entitled to notice of the proceedings in which the judgmen was rendered, or to conclude their rights. By the public law of the State a suit against a defendant is to be tried in the county where he resides. Ordinary suits are to be commenced by petition and process requiring the defendant to appear at the Court in which the suit is instituted, and must be served on the defendant or left at his residence. If the record of the proceedings and judgment of the Superior Court should be offered in evidence, and upon an inspection thereof it did not appear that the defendant resided in the county in which the judgment was rendered, and it did not appear that there had been any service thereof as required by law, and no appearance by the defendant or notice to him of the pendency of the suit, could the Court in which such a record was offered legally presume in favor of the validity of such

a judgment? I think not; and why not? Because it did not appear on the face of the record that the Court rendering the judgment had jurisdiction of the person of the defendant as required by law. If it be shown on the face of the record that the Court rendering the judgment had jurisdiction of the person, and the subject matter, mere irregularities in the proceedings of the Court would not make the judgment void. The judgment rendered by the Ordinary was void as against the judgment creditor of the testator. The *nunc pro tunc* order granted by the Ordinary, at Chambers, 31st May, 1871, to amend the former proceeding does not appear to have been made on the application of the widow by petition in writing, or that any notice of that application was given to the executors or creditors, but was a mere *ex parte* proceeding, made long after the expiration of the six months allowed to file objections. It would be a dangerous practice to allow the Ordinary, after such a lapse of time, to amend and correct his records upon a mere *ex parte* application, not made according to law, and without any notice to parties interested. The last application to amend and the order of the Ordinary is not in compliance with the law any more than was the first proceeding.

Let the judgment of the Court below be affirmed.

MONTGOMERY, Judge, concurring.

I concur in the judgment of the Court in this case, upon the ground that the proceeding to set aside twelve months' support for a widow out of the estate of her deceased husband, is a special one before the Ordinary, as contra-distinguished from the Court of Ordinary, and everything required by the Code to be done in order to give the Ordinary jurisdiction, should appear on the face of the proceedings.

McCAY, Judge, dissenting.

1. Courts of Ordinary in this State are Courts of general jurisdiction, and their judgments are not void, because the

proceedings do not upon their face show that notice has been given to those entitled to notice of any matter upon which the Court has acted.

2. The judgment of a Court of general jurisdiction is not void because its proceedings fail to conform to the rules of practice prescribed by law for the transaction of its business. Such failures are irregularities, and cannot be objected to except in the Court giving the judgment and on a proceeding for that purpose.

3. The Ordinary, in appointing commissioners to lay off a year's support for the widow and children of a deceased person, and in carrying to record their report, acts in the sphere of his constitutional jurisdiction, and exercises the powers of a Court of Ordinary, and his judgments are entitled to the presumptions allowed by law to the judgments of a Court of general jurisdiction.

JOHN B. LATIMER, plaintiff in error, *vs.* R. STOKES SAYRE, defendant in error.

JOHN B. LATIMER, plaintiff in error, *vs.* HARRIET SAYRE *et al.*, defendants in error.

On the trial of a bill filed by an administrator of an estate against the legatees and creditors to marshal the assets, one of the creditors is not a competent witness to testify as to the nature and character of his contract with the deceased, even though the witness only proposes to state facts showing the dignity of the contract, and affecting only its priority.

Where there was a settlement between one of the executors of an estate and the legatees, in which there was turned over to the legatees a note of the executor, with a third party as security, as a part of the assets of the estate, and at the same time the executor gave to the legatees his individual note for the balance in his hands, and there was a distinct understanding that the last note was only given as evidence of the amount due, and that the executor was to be liable as executor for the amount of the same:

Held, That the last note was still a trust debt and entitled to priority in the distribution of assets, but the first was not.

When one executor, having money in hand, loans it to another executor, taking his individual note for it, and in a settlement with the legatees, they take from the executor loaning the money the note as assets, giving him a full discharge and acquitance of all liability:

Held, That the note thus turned over is not a trust debt as against the maker of the note, and his statement that it shall be so considered does not make it such as to give it priority over other debts in the distribution of the estate of the maker of the note.

Party as witness. Distribution. Trust debt. Before Judge ANDREWS. Hancock Superior Court. October Term, 1871.

These two cases involving the same principle and the same transaction, were argued together. Jackson B. Johnson, as administrator *de bonis non cum testamento annexo*, upon the estate of James Thomas, deceased, filed his bill, praying, among other things, that the creditors of said estate might interplead among themselves, and thus ascertain whether the claims held by R. Stokes Sayre, Harriet Sayre, Nathan C. Sayre and Mary E. Calhoun, formerly Mary E. Sayre, are debts due from James Thomas as an individual, or as executor of Nathan C. Sayre, deceased, the aforesaid creditors affirming in their answers that said claims are due by Thomas, as executor, and one John B. Latimer, another creditor, affirming, by his answer, that said indebtedness is individual. This issue was submitted to a jury. R. Stokes Sayre offered himself as a witness to show what the contract was between him and the said Thomas at the time he received the claims for himself, his brother and sisters. An objection was made to his competency on account of Thomas being dead, which was overruled by the Court.

It appeared from the evidence that on October 25th, 1865, R. Stokes Sayre, acting for himself and as agent for Harriet Sayre and Mary E. Sayre, and for the guardian of Nathan C. Sayre, his sisters and brother, made a settlement with James Thomas, one of two executors of Nathan C. Sayre, deceased, for what was due to himself, his brother and sisters, amount-

ing to over $26,000, and gave to Thomas receipts; that in said settlement he received no money, but only papers which were assets of Sayre's estate, except the note for thirty-eight hundred and odd dollars, made by said Thomas, bearing date the day of the settlement, and made to cover the balance for which said executor had no assets in hand; that these assets consisted largely of claims on outside persons, and were received in absolute payment as far as they went; that among the assets of the Sayre estate received by him was a note on James Thomas, as principal, and Joseph B. Gonder, as security, for $3,000; that the note made by Thomas on the day of the settlement was received with the express understanding that the trust character of the debt should not be changed, it being given merely as evidence of the amount due by the executor; that James Thomas said that the settlement was made to save trouble after his death in ascertaining the amount due from him, and not at all to change the priority of payment which the law would give; that the note for $2,500, payable to H. Rogers, the other executor, was not received by R. Stokes Sayre in the settlement with Thomas, and was not covered by the receipts then given; that said note was then in possession of Rogers, having been given by Thomas for money of the Sayre estate loaned by Rogers, his co-executor, to him; that Rogers was present at the settlement and asked said Thomas how said note would be affected as to priority of payment after his death; that Thomas answered, it would stand like all the rest having his name on them, entitled to priority as debts due by him as executor; that afterwards, said Thomas not being present, R. Stokes Sayre received this last mentioned note in settlement with Rogers, as an absolute discharge, to that extent of Rogers' liability as executor. The receipts given by R. Stokes Sayre to James Thomas for over $26,000 were unconditional.

The Court charged the jury, "That a settlement between the legatees of Sayre and Thomas, the executor, covering the amount due from the executor, with receipts from the lega-

s, acknowledging payment for that amount, is, when con-
lered by itself, *prima facie* evidence that the payment was
solute, and that nothing is now due from the executor, as
ch; but this is only a presumption, and is removed if, at
e time of the settlement, there was an express understand-
g between the parties that the payment should not be abso-
te, but that the claims now before you should be debts
ainst Thomas, not as an individual, but as executor of
yre. And this instruction applies to the note for $2,500,
well as to the other claims, if you should believe from the
idence that at the time of the settlement between Thomas
d the legatees of Sayre, he said this note would also be a
bt against him as executor, and would be entitled to the
ority of payment belonging to that class of debts, after
i death, although the note may not have been embraced in
it settlement, and may have been in the possession of the
ier executor (Rogers) at that time, and may have been
erwards turned over to the legatees by Rogers, in absо-
e discharge of his liability as executor to the extent of
: note."

The Court was requested in writing, and refused to give,
: following charge to the jury: "If the note for $2,500
s accepted by Rogers, one of the executors, from Thomas,
: other executor, before Thomas' settlement with the lega-
s, as assets of the estate, and was held by Rogers at the
ie of Thomas' settlement with the legatees, and was not
:luded in Thomas' settlement, but was afterwards received
the legatees from Rogers in part final payment of Rogers'
bility as executor, then said note is due from Thomas, not
his character as executor, but in his character as an indi-
lual, and is not entitled to the priority which belongs to
bts due from an executor; and this is true, although, at
e time of the settlement with Thomas, he may have said
at the note for $2,500 would not lose its priority."

The jury returned a verdict giving to all of the aforesaid
ims priority of payment.

John B. Latimer tenders his bill of exceptions, and says that the Court erred:

1st. In holding R. Stokes Sayre to be a competent witness, Thomas, the other party to the contract, being dead.

2d. In charging the jury, as hereinbefore set forth.

3d. In refusing to charge the jury, in writing, as set forth.

LINTON STEPHENS; GEORGE F. PIERCE, for plaintiff in error.

R. TOOMBS; C. W. DUBOSE, for defendants.

McCAY, Judge.

The Evidence Act of 1865–6, authorizing parties to be witnesses, in terms, excepts cases where one of the original parties to the cause of action on trial is dead, or where an executor or administrator is a party to a suit on a contract of his intestate or his testator: Section 3798 of the Code. This case is within the very letter of the Act. True, on that trial there has arisen another issue, in which the administrator has no special interest, since, in the condition of this estate, it matters but little to him and to the heirs-at-law, which of the creditors shall be first paid. But it will be a very dangerous practice to open the door to the evidence of the living party on special facts. Where are we to stop? Perhaps the fact sought to be proved may need to be explained by going into the whole matter. The parties here defending, to-wit: the other creditors, are privies of the testator; they stand in his shoes; his property is in trust for their benefit and *prima facie* for their equal benefit. Is it fair to them, his successors, to permit one of the parties to the contract to be a witness, when the other party, to whose rights they succeed, is not here to confront the witness? The letter of the Act excludes the witness, and we do not feel authorized to make this an exceptional case. Very clearly, from the facts as they transpired at the settlement, the note with security was un-

rstood by the parties to be a settlement of the trust, a nova-
n by which a note with security was taken in lieu of the
im. The parties seem specially to have had this in view.
was taken as assets, not as a contract then made; it was
understood; the wards evidently looked to the security;
ey preferred that to the obligation of the executor, and this
the more evident from the fact that it was specially agreed
to the note taken of the executor on that day, that this
st note was not taken in discharge of the trust. The exe-
tor was still to be liable on that note as *executor*. It is
rely a question of intention. We held this in another
se at this term, to-wit: the case of Coleman *vs.* Davis, from
ichmond. The mere giving of the note even might not
a settlement, perhaps even adding a surety to it would not
ange the character of the debt, but the circumstances in
oof show that it was the intent so to do. The difference be-
een the note with security and the note without was well un-
rstood and remarked upon; one was considered and taken as
sets; the other as a mere memorandum of the amount due
executor. Our judgment is, that the note without security
still a trust debt, and the notes taken as assets from Mr.
omas, are not trust debts, in the sense of the Statute of Dis-
butions.

As to the other note, the one taken from the co-executor.
is very plain that by the express contract of the parties
executor was discharged. In lieu of their joint debts
inst both the executors, the *cestui que trusts* agreed to take
note of one of the executors, turned over to them by the
er, and they gave him a full discharge. This note was a
sonal debt of Mr. Thomas to the other executor. True, it
given for money of the estate, received by and charged
im. But on the receipt of it, they acquitted him of his
t, and as soon as this occurred the trust ceased. Mr.
mas could not, by his agreement, give it again a trust char-
r. It would be a dangerous rule to permit a man *thus*
ive priority to one over another in the distribution of

his assets. The foundation of the priority of trust debts is, that the intestate has no estate until trust debts are paid; it is not his; he only has it in trust. To come within the rule, the debt must be in fact a trust debt; it is not sufficient that it shall be agreed to be so considered. Other persons have rights in this besides the deceased, and it is the law and not the agreement of the parties that regulates the priority.

Judgment reversed.

JOHN R. LATIMER, plaintiff in error, *vs.* S. H. LANE, defendant in error.

When a defendant filed his plea to the plaintiff's action, alleging that the plaintiff agreed to do certain things, on his part, to enable the defendant to procure the title to a tract of land, so as to enable him to convey the title thereto to the plaintiff, which were specially set forth in the plea, and that this was part and parcel of one and the same contract, and that, by reason of the plaintiff failing to perform his part of the contract, the defendant has been damaged to the amount for which the plaintiff has sued him, and claimed the right to recoup the same amount, by way of damages, from the plaintiff for the breach of the contract on his part, and to set off the damages sustained by him against the plaintiff's demand:

Held, That the Court erred in sustaining a general demurrer to the defendant's plea, and ordering the same to be stricken from the record.

False representation. Recoupment. Former adjudication. Rescission. Before Judge ANDREWS. Hancock Superior Court. October Term, 1871.

The record shows that the counter-claim sought to be recouped by defendant existed before June 1st, 1865. For the facts of the case, see the decision.

LINTON STEPHENS; E. H. POTTLE, for plaintiff in error.

R. TOOMBS; C. W. DUBOSE, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant to recover the sum of $2,125, for five hundred acres of land, known as the Tye place, the plaintiff alleging that the defendant fraudulently represented to him that he had the title to said land; that the plaintiff, on the 14th day of January, 1868, paid to the defendant the said sum of $2,125 for the land, and that the defendant bound himself to make a title thereto, within a reasonable time, which he has failed to do; that, at the time of making the contract, the defendant did not have the title to the land, and this suit was brought to recover from the defendant the money paid by the plaintiff therefor.

On a former trial of this case in the Court below, the defendant pleaded that the contract for the sale of the land had been *rescinded* by the fraudulent conduct of the plaintiff, and the jury found a verdict, under the charge of the Court, for the defendant. The case was brought before this Court, and the judgment of the Court below was reversed, for error in the charge of the Court to the jury, and a new trial ordered, this Court holding and deciding that the defendant could not claim that the contract for the sale of the land had been rescinded by the fraudulent conduct of the plaintiff, and at the same time retain the purchase-money paid him by the plaintiff therefor. When the case was remanded back to the Court below for a new trial, the defendant withdrew his plea of a rescission of the contract for the sale of the land, on the ground of the fraudulent representations of the plaintiff, and filed a new plea, in which he affirmed the contract for the sale of the land, but alleges that the plaintiff made an agreement, which is specially set forth in the plea, by which he agreed to do certain things on his part to enable the defendant to procure the title to the land, so as to enable him to convey the title thereto to the plaintiff, and that this was part and parcel of one and the same contract, and that, by reason

of the plaintiffs failing to perform his part of the contract, he has been damaged to the amount for which the plaintiff has sued him, and claims the right to recoup the same amount, by way of damages, from the plaintiff for the breach of the contract on his part, and to set off the damages sustained by him against the plaintiff's demand. To this plea of the defendant, the plaintiff demurred generally. The Court sustained the demurrer, and ordered the plea to be stricken, whereupon the defendant excepted.

The argument before this Court, in favor of the judgment of the Court below, is, that the plea contained no new facts that were not adjudicated when the case was before this Court at the former term; that the defendant's defense, as now set forth in his plea, is, substantially, the same now as it was then. We do not think so. The point in the case, as made by the defendant's plea on the former hearing before this Court, was whether the defendant could claim to have the contract for the sale of the land *rescinded*, on the ground of the plaintiff's fraud, and, at the same time, claim to retain the money which he had received for the land. The plea now before the Court does not seek to *rescind* the contract on the ground of fraud, but, on the contrary, *affirms* it, and seeks to recoup and set off the damages which the defendant has sustained, in consequence of the breach of that contract on the part of the plaintiff.

Recoupment is a right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross obligations, or independent covenants, arising under *the same contract*, and includes all mutual debts and *liabilities*. Recoupment may be pleaded in all actions, *ex contractu*, where, from any reason, the plaintiff under the same contract is, in good conscience, liable to the defendant: Code, 2858, 2859, 2861.

In our judgment, the Court below erred in sustaining the demurrer to the defendant's plea. If the Act of 1870, re-

quiring an affidavit that all legal taxes had been paid, is a valid law, still, this case was not within the provisions of that Act.

Let the judgment of the Court below be reversed.

GEORGE GRANT, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

Where, in a criminal case, the Court charges the jury, "it is my opinion that you can infer from Grant's [the defendant's] admission, that the pistol which he shot had a ball in it, inasmuch as he undertook to point out the place where the ball struck, whether that was the place or not," this Court is required by Revised Code, section 3183, to grant a new trial.

Criminal Law. Charge of Court. Opinion upon facts. Before Judge ANDREWS. Hart Superior Court. September Term, 1871.

In the progress of the charge the Court used the following language: "I further state to you, gentlemen of the jury, my opinion is that you can infer from Grant's admission, that the pistol which he shot had a ball in it, inasmuch as he undertook to point out the place where the ball struck, whether that was the place or not."

E. P. EDWARDS and JOHN H. SKELTON, by JOHN C. REID, for plaintiff in error.

SAMUEL LUMPKIN, Solicitor General, represented by Z. D. HARRISON, for the State.

MONTGOMERY, Judge.

In this case the Court feels constrained, by section 3183 of the Code, to reverse the judgment of the Court below, and therefore renders the following judgment: Where, in a crim-

inal case, the Court charges the jury, "it is my opinion that you can infer from Grant's [the defendant's] admission, that the pistol which he shot had a ball in it, inasmuch as he undertook to point out the place where the ball struck, whether that was the place or not," this Court is required by Revised Code, section 3183, to grant a new trial.

Judgment reversed.

ANN E. HOBBS, plaintiff in error *vs.* M. M. CODY, guardian, defendant in error.

Any party at interest who is dissatisfied with a judgment of the Ordinary, may appeal to the Superior Court on payment of costs and giving security for future costs, except in a case involving the removal of an administrator, etc., and this right of appeal on the terms indicated extends also to cases where the Ordinary has given judgment for money against an administrator, or guardian under a citation for a settlement, as provided by section 1830 of the Revised Code.

The Act of 16th March, 1869, requiring all causes of action accruing before 1st of June, 1865, to be sued by the 1st of January, 1870, does not apply to a suit by a ward against his guardian to compel an account, if the ward does not come of age until after June, 1865, since the cause of action—the refusal of the guardian to account—did not accrue until the ward came of age.

Appeal from Ordinary. Guardian and Ward. Statute of Limitations. Tried before Judge ANDREWS. Warren Superior Court. October Term, 1871.

The petition of Ann E. Hobbs to the Ordinary of Warren county, filed on August 2d, 1870, showed that James Hobbs departed this life intestate in the year 1850, and that Jane Hobbs became his administratrix; that there were eleven distributees of said estate; that on February 1st, 1860, it was ascertained that each distributee was entitled to $415.13; that M. M. Cody became the guardian of petitioner and of Brewer Hobbs, two of said distributees; that on the day and

aforesaid, said guardian received the full shares of peti-
:r and of the said Brewer, in said estate; that petitioner
me of age on September 8th, 1869, and has frequently
inded a settlement of said Cody, who has heretofore re-
l; that Brewer Hobbs died some time during the late war
itate and without wife or child; that petitioner as his
r is one of his heirs-at-law, and is entitled to a ninth portion
is estate; that said Cody became, by the operation of law,
inistrator upon his estate, prays for a rule *nisi* requiring
Cody to appear and settle. The Ordinary rendered a
;ment in favor of Ann E. Hobbs for the sum of $459,
cipal debt, besides interest. M. M. Cody being dissatis-
entered an appeal as follows: "The plaintiff (?) being
itisfied with the judgment of the Ordinary in the above
d case, and having paid all costs which have heretofore
ued thereon, brings N. Gallaher and tenders him as secu-
on appeal; and the said M. M. Cody and N Gallaher
owledge themselves held and bound unto the Ordinary
his successors in office, for the payment of such further
of costs as may accrue in said case by reason of the ap-
This September 6th, 1870.

M. M. CODY, [LS]
NICHOLAS GALLAHER. [LS]

st:
T. H. GIBSON, Notary Public."
on the trial in the Superior Court, plaintiff moved to
iss the appeal upon the following grounds, to-wit:
:. Because the appeal bond was made payable to the
nary of Warren county.
. Because said bond was conditioned to pay all future
and was not conditioned to pay the eventual condem-
n money.
. Because said bond was not tested and approved by the
nary.
ie Court sustained the motion. Defendant moved to
d the bond to make it conform to the statute; the Court

allowed the amendment, and plaintiff excepted. The defendant pleaded the Statute of Limitations, to-wit: the Act of March 16th, 1869, it being admitted that the plaintiff became of age on September 8th, 1869. The case went to the jury upon that issue. The Court charged that plaintiff's case was within the said Act, and her claim barred. Whereupon plaintiff excepted and assigns the aforesaid rulings as error.

E. H. POTTLE, for plaintiff in error.

A. S. MORGAN; R. TOOMBS, for defendant.

McCAY, Judge.

Section 3553 of the Code, allowing appeals from the judgment of the Ordinary, is general, and applies to *all* cases. The Constitution also gives this right of appeal from the Ordinary. Section 3567 also fixes the terms on which the appeal shall be allowed. It would be judicial legislation for us to fix other terms. Indeed, the Legislature, by Act of 1866, Code, section 3553, has provided other terms than were fixed by the old Code, in one special case. We do not feel authorized to make another exception.

Section 3559, without doubt, applies to appeals from other Courts than the Courts of Ordinary, since section 3553 had made other terms for such appeals. So section 3565 must be confined to appeals from other Courts than Courts of Ordinary, for the reason that section 3567, in almost the next breath, provides that *in all cases in the Court of Ordinary* the party desiring to appeal shall pay the costs and give security for further costs; and this being done, the appeal shall be entered. So that we can see no ground for the belief that any other terms have been prescribed for appeals from the Ordinary than those fixed in section 3567 of the Code.

It may be that the case before us is a *casus omissus*. If so, it is for the Legislature, not the Courts, to remedy the defect. We doubt, however, if there was any omission. The power

iven to the Ordinary to give such judgments is only of very uestionable propriety; nay, even its constitutionality has een doubted, and it may well be that the codifiers and the egislature adopting the Code, might feel that the security lready given, to-wit: the bond taken at the appointment of he administrator or guardian was sufficient, and hesitated to ntrust with the Ordinary the power to grant a judgment hich could only be appealed from by giving new security ho were to be bound by the judgment.

There was no right of action by the ward until his matur- ty The guardian had a right, and it was his duty, to keep nd manage this estate until the majority of the minor. here was, therefore, no cause of action until after the 1st of une, 1865, and the Act of 1869 expressly provides that when he cause of action accrued after 1865, it should be regulated s to the Statute of Limitations by the Code. We think, herefore, the Court was in error in requiring the security, nd that the cause of action was not barred.

Judgment reversed.

JANE E. LOWE and CHARLES C. LOWE, plaintiffs in error, *vs.* O. L. CLOUD, executor, ELIZABETH TARVER and MARGARET TARVER, defendants in error.

A will, the first item of which conveys a life-estate to one of the sisters of testatrix, with remainder to Charles C. Lowe, the son of such sister, in one-half of a plantation, said half lying on the east of the Warrenton road, and the second item of which, so far as material to the consideration of this case, reads as follows: "I give and bequeath to Elizabeth Tarver, (another sister,) and Margaret Ann Tarver, (daughter of Elizabeth Tarver,) the portion of the plantation lying on the west side of the Warrenton road, adjoining lands belonging to Walter F. Lewis, Hugh Armstrong and others: provided they come and live on it; if not, to remain with the other lot, and at the death of Elizabeth Tarver and Margaret Ann Tarver, that portion of land also to go to Charles C. Lowe," conveys a fee in the land on the west of the War-

renton road to Elizabeth Tarver and Margaret Ann Tarver, upon their compliance with the condition, that is to say, upon their going upon the land to live.

Interpleader. Construction of will. Before Judge Andrews. Warren Superior Court. October Term, 1871.

This case arose upon a bill filed by O. L. Cloud as executor of the will of M. M. Shaw, deceased, against Elizabeth Tarver, Margaret Ann Tarver, Jane E. Lowe and Charles C. Lowe, for direction and construction of the second item of said will, and also praying that the legatees might be required to interplead. The second item was as follows: "Item second. I give and bequeath to Elizabeth Tarver, (sister of testatrix) and Margaret Ann Tarver, (daughter of Elizabeth Tarver,) the portion of plantation lying on the west side of the Warrenton road, adjoining lands to Walter F. Lewis, Hugh Armstrong and others: provided they come and live on it; if not, to remain with the other lot, and at the death of Elizabeth Tarver and Margaret Ann Tarver, that portion of land, also, to go to Charles C. Lowe." Elizabeth Tarver and Margaret Ann Tarver insisted that by said item the testatrix intended, and did, devise to them in fee the said land, provided they lived on it; that they elected to live on it, and that therefore the fee became absolute. Jane E. Lowe and Charles C. Lowe contended that under said item Elizabeth Tarver and Margaret Ann Tarver took only a life-estate in said land, remainder to Charles C. Lowe. The Court held that the Tarvers took a fee simple to said land, and plaintiffs in error excepted.

R. Toombs; E. H. Pottle, for plaintiffs in error.

Linton Stephens, for defendants.

Montgomery, Judge.

Nothing remains to be added, in this case, to the decision as contained in the syllabus. It is therefore here repeated.

A will, the first item of which conveys a life estate to one of the sisters of testatrix, with remainder to Charles C. Lowe, the son of such sister, in one-half of a plantation, said half lying on the east of the Warrenton road, and the second item of which, so far as is material to the consideration of this case, reads as follow: "I give and bequeath to Elizabeth Tarver, (another sister,) and Margaret Ann Tarver, (daughter of Elizabeth Tarver,) the portion of the plantation lying on the west side of the Warrenton road, adjoining lands belonging to Walter F. Lewis, Hugh Armstrong and others: Provided they come and live on it. If not, to remain with the other lot, and at the death of Elizabeth Tarver and Margaret Ann Tarver, that portion of land also to go to Charles C. Lowe," conveys a fee in the land on the west of the Warrenton road to Elizabeth Tarver and Margaret Ann Tarver, upon their compliance with the condition, that is to say, upon their going upon the land to live.

Judgment affirmed.

JOSEPH J. and SARAH J. LATHROP, plaintiffs in error, *vs.* THE SOLDIERS' LOAN AND BUILDING ASSOCIATION, defendants in error.

The Superior Court has jurisdiction to correct errors by a writ of *certiorari* to the judgment of the Ordinary, allowing a homestead under the provisions of the seventh section of the Homestead Act of 1868.

When a married woman, having a separate estate, executed a mortgage thereon to secure the payment of the sum of $8,000 loaned to her, and made an affidavit on the back of the mortgage that the money was to be used for the payment of the purchase-money due for the property; and it appearing that the money was loaned on the faith of that sworn statement:

Held, That she was estopped from controverting the facts stated in her affidavit on an application for homestead exemption under the Homestead Act of 1868, as against the mortgagee.

The wife having no children of her own, is not the "head of a family" of the children of her husband by a former marriage. (R.)

Homestead. Estoppel. *Certiorari.* Practice. Separate property. Before Judge GIBSON. Richmond Superior Court. January Term, 1871.

For the facts of this case, see the decision.

HOOK & GARDNER, for plaintiff in error.

J. GANAHL, for defendant. The property of the wife is not subject to homestead, unless she had assigned the property to the husband, or they were living apart: Code, section 1743. Husband the head of the family: Homestead Act, 1869, sections 1, 27; Homestead Act, 1870, sections 3, 4; Constitution, Article VII., section 6. The Loan Association is within the exceptions, being a purchase-money creditor: Chambless *vs.* Phelps, 39 Georgia, 386. Exceptions not triable by Ordinary. If the exceptions are tried by the Ordinary, the creditor being a party, he is bound: 41 Georgia, 96. *Certiorari* the proper remedy. Appeal did not lie. If it did, that circumstance did not take away the remedy of *certiorari:* Constitution, Article V., section 3; 3 Bouv. Inst., section 2528; 3 Hammond, 279; 14 Mass., 420; 7 Pickering, 321; 6 E. C. L., 521; 2 Chitty, Gen. Prac., 215.

WARNER, Chief Justice.

An application was made to the Ordinary of Richmond county by J. J. Lathrop and S. J. Lathrop, his wife, as head of a family, for a homestead exemption out of the value of a city lot in the city of Augusta, under the provisions of the 7th section of the Homestead Act of 1868. The Ordinary allowed the homestead, and the Soldiers' Loan and Building Association, a mortgage creditor of the applicants, excepted to the judgment of the Ordinary allowing the homestead, on the ground that the applicants were not entitled to the homestead exemption prayed for under the law applicable to the facts of the case. The exceptions were overruled by the Or-

ary, and the mortgage creditor applied for and obtained a *iorari* and brought the case before the Superior Court. the hearing in the Superior Court, a motion was made lismiss the *certiorari*, on the ground that the creditor's ıedy was by an appeal to the Superior Court and that a *iorari* would not lie to correct errors of law in the judgıt of the Ordinary, which motion was overruled, and the endants excepted. On hearing the *certiorari*, the Court tained the same and set aside the judgment of the Orary allowing the homestead, and defendants excepted. ere was no error in overruling the motion to dismiss the *iorari*. If the jurisdiction of the Superior Court to cort errors in inferior jurisdictions by writ of *certiorari*, as ferred by the Constitution, was ousted by the provision an appeal under the sixth section of the Act, (which we not concede,) it certainly is not in relation to proceedings l under the seventh section. It appears from the evidence he record that the city lot is the separate property of Mrs. hrop, that she has no children, but her husband has chiln by a former marriage. She is under no legal or moral igation to support his children. She was not the head of mily of the minor children of her husband within the aning of the first section of the Act of 1868, and her husıd and his children had no title to the property.

t appears from the record, that on the 16th day of Febry, 1866, Mrs. Lathrop mortgaged the city lot to the diers' Loan and Building Association as her separate perty, to secure the loan to her of the sum of $8,000 and erest thereon. It also appears that she made an affidavit the back of said mortgage, before a Notary Public, (who mined her separate and apart from her husband) that the rtgage was executed by her free will and consent, and that mortgage money was to be used for the payment of the ney due on the purchase of the property, to John H. rer, Esq. It also appears from the evidence in the record t the money was loaned to her on the faith of her sworn tement on the back of the mortgage.

In our judgment, Mrs. Lathrop is estopped from controverting the facts stated in her affidavit, and to allow her to claim a homestead exemption under the seventh section of the Act, as against the mortgagee, would be, to speak in the mildest terms, a legal fraud. We find no error in the judgment of the Superior Court in sustaining the *certiorari*, upon the facts disclosed in this record.

Let the judgment of the Court below be affirmed.

FRANCIS D. CLARK, plaintiff in error, *vs.* GEORGE D. CHAPMAN and THE CENTRAL RAILROAD AND BANKING COMPANY, garnishee, defendants in error.

The Central Railroad and Banking Company cannot be served with a summons of garnishment by serving *any one* of its agents. The service must be on the President of the Company.

The Central Railroad and Banking Company has, by law, its principal office of business at Savannah, and it cannot be required to answer a summons of garnishment in any other county than the county of Chatham, unless it appear on the record that the debt it is charged to owe is within some of the statutes authorizing corporations to be sued out of the county where the principal business office is situated.

The garnishee is bound to answer what he is indebted, etc., before the calling of the cause against him at the second term, unless by leave of the Court, he is granted further time, and if he neglects so to answer until the plaintiff has obtained his judgment against the principal debtor, and the juries have been discharged for the term, it is error in the Court to permit him then to answer, unless for good cause shown.

In this case, as it appears from the record, that the garnishee was not bound to answer in Richmond county at all, and was not properly served with the summons, we affirm the judgment of the Court, discharging the garnishee.

Garnishment. Service on Railroad Companies. Venue. Time of answer. Before Judge GIBSON. Richmond Superior Court. June Term, 1871.

Francis D. Clark brought complaint against George D. Chapman, and served a summons of garnishment addressed

e Central Railroad and Banking Company, upon Joseph reston, agent of said company at Augusta, at the place ansacting the business of the corporation. After judg- had been obtained against the defendant, and after the had been discharged, plaintiff moved to enter up judg- against the garnishee. The Court asked if any person sented the Central Railroad and Banking Company. esponse being made, the Court sent for Davenport Jack- Esq., who had represented said company in other cases. the lapse of an hour, the Court, in the meantime being ged in other business, Davenport Jackson, Esq., pre- d the answer of Joseph B. Preston, as agent of the al Railroad and Banking Company, which the Court ed to be filed, notwithstanding the objections of the tiff, and refused judgment against the garnishee, where- plaintiff excepted.

ANK H. MILLER, for plaintiff in error, cited 32 Ga. R., 119; 15 Ga. R., 188; 38 Ga. R., 299; Code, section ; 30 Ga. R., 923; 38 Ga. R., 602. Plaintiff was en- to judgment against the garnishee at the first term judgment against the defendant. The Central Rail- and Banking Company are lessees of the Augusta and nah Railroad, and liable to suit in Richmond county, Act of April 17, 1863: Code, sections 3293, 3330.

CKSON, LAWTON and BASINGER; DAVENPORT JACK- for defendants. No summons was served which re- d a return by the garnishee or any of its agents. Suits be tried in the county where the defendant resides: titution of Georgia, section 12; Code, section 5206. residence of the corporation here garnisheed is in the y of Chatham, and it is liable to be sued only in that y: Charter of Central Railroad and Banking Company, n 21; Angell and Ames on Corp., section 107 and cases cited; 24 Ga. R., 364; 38 Ga. R., 222. Corporations e sued in county other than that of residence only in

specified cases: 24 Ga. R., 364. Process of garnishment can be served upon persons residing in county other than that of suit: Code, sections 3486, 3487. The term "persons" includes a corporation: Code, section 5; 24 Ga. R., 362.

McCAY, Judge.

1. The Code provides that garnishments shall be served personally: Code, sections 3226, 3481; and this for a very good reason. It is of great importance to the garnishee that he shall know he is not authorized to settle with the defendant. This he cannot know certainly and speedily by a summons which is not personal. This same reason applies to a corporation. Service on *any* agent may fairly be allowed of ordinary process. It is fair to presume that the agent will *very soon* notify the chief officer or president. But a garnishment operates immediately. *Any* payment after service is illegal; and it would be grossly unfair to hold the company bound to take notice immediately, and act at its peril, on a notice to a mere agent, at, perhaps, a remote point from its principal place of business. As we have said, the law requires garnishments to be served personally; and we do not think that section of the Code, 3293, which authorizes service in ordinary suits against corporations to be served by leaving copies, or by serving *any* mere agent, applies to garnishments. Personal service against corporations may be effected by serving the president, or other officer fulfilling the duties of such officer, as at common law.

2. But the Code, sections 746, 2988, 2994, which authorizes suits against railroads in other counties than the place of the principal business office of the company, does not apply to all classes of suits. Suits for damages to property or to person, and suits upon contracts, may be brought, the former in the county where the injury was done, and, in the latter, where the contract is made, or to be performed. But this debt does not appear to come within either of these classes. The Central Railroad Company has, by its charter, its prin-

ipal business office in Chatham, and it is there entitled to be ued, except in cases otherwise expressly provided: Acts of 1834. We think, therefore, for these reasons, this garnishnent was neither properly served, nor properly returned. It hould have been made returnable to Chatham county, and een served personally, on the president of the company. We hink the Court erred in permitting this answer to come in t so late a period. The law requires the answer to be at the irst term. We see no objection to giving time until the udgment goes against the principal debtor, and have seveal times ruled that the Court may indulge the garnishee till hat time. Perhaps there is no objection to indulgence for ood reasons, up to a reasonable time before the dismissal of the uries. But it seems to us that, after it is too late to get a trial n the traverse of the answer, there ought to be very strong easons for delay. The plaintiff, having got a judgment against he principal debtor, has a *right* to his judgment against he garnishee, who is in default, and it is unjust to him o put him off any longer, unless for some very good reaon. But as we are clear a judgment of reversal would do o good, since the whole proceeding is wrong, we will not disturb the judgment, which, at last, is only one discharging the garnishee.

Judgment affirmed.

JOHN S. COLEMAN, trustee and next friend, plaintiff in error, *vs.* THOMAS J. DAVIES, defendant in error.

The taking of the individual note under seal of a guardian by the husband of the ward, in settlement of the guardian's account, which note is payable to the husband, as trustee of his wife, and a receipt in full by husband and wife to the guardian, whereby they release him "from any and all liability growing out of, or connected with said guardianship," and the further fact that the marriage settlement, under which the husband is trustee, limits the property settled (of which the note is

part) to the wife for life, with remainders over, is a novation of the original debt of the guardian, and destroys its fiduciary character. And if parol evidence be introduced to show that the parties really intended to discharge the guardian, as such, and the Judge, by his charge, leaves the question of discharge to the jury and they find in the affirmative, this Court will not disturb the verdict.

Novation. Discharge of guardian. Fiduciary debt. Before Judge GIBSON. Richmond Superior Court. June Term, 1871.

John S. Coleman, as trustee for Carrie Wyatt Coleman, and next friend of Thomas D. Coleman, a minor, brought complaint against Thomas J. Davies upon a promissory note, dated May 9th, 1864, due thirty days after the date thereof, payable to John S. Coleman, as trustee, for the sum of $10,049.13, with interest from May 1st, 1864, returnable to June Term, 1870. The defendant pleaded that said note was given for Confederate money; also, his discharge as a bankrupt on March 2d, 1870; also, that the consideration of said note was slaves. At June Term, 1871, plaintiff amended his declaration by adding a count upon a statement prepared by defendant in April, 1864, showing an indebtedness as guardian to Carrie Wyatt Coleman in the sum set forth in the above described note, to which amendment the defendant pleaded the said note as a settlement in full, and as a discharge from all liability on the above statement of account; also, that the cause of action set forth in the said amendment accrued upon a contract made prior to June 1st, 1865, and no action was brought thereon by January 1st, 1870. Amongst other evidence introduced, there was a trust deed under which plaintiff sues, as trustee, dated May 7th, 1864, by which plaintiff conveyed the above described note in trust to his said wife, for life—remainder to her children. Also, a receipt dated May 7th, 1864, given to defendant, signed by plaintiff and his said wife, acknowledging the payment of $10,049.13, in which is found the following language: "And we, the said John S. and Carrie Wyatt Coleman, do hereby acquit and discharge

he said Thomas S. Davies, his heirs, executors and administrators, from any and all liability to us and our heirs, executors and administrators, growing out of, or connected with said guardianship." Parol evidence was admitted to show that plaintiff, by accepting the note, intended to discharge the defendant as guardian. The jury found for the defendant. Whereupon plaintiff moved for a new trial, which motion was overruled, and plaintiffs excepted, upon the following among other grounds: 1st. Because the Court refused to charge as requested, "That a debt due by defendant, as guardian or trustee, is due in a fiduciary character, within the provisions of the Bankrupt Act, and the acceptance of the individual note of the guardian, without security for the amount named in the final receipt does not take away the fiduciary character of the debt." 2d. Because the Court refused to charge as requested, "That a novation or new contract can only exist where the parties are separate and distinct, and that the giving of a note May 9th, 1864, prior to the Act of November, 1866, and the Constitution of 1868, to the husband as the trustee of his wife, the former ward or *cestui que trust*, was not a novation"—the Court giving said request to the word "distinct," and refusiug the balance. 3d. Because the Court charged the jury, "That if defendant's individual note was taken in discharge of his liability to Mrs. Coleman, his former ward, and defendant had been discharged in bankruptcy since the giving of the note, they should discharge him from liability thereon."

Frank H. Miller, for plaintiff in error. 1st. Promissory notes are not payment until paid: Code, section 2816. 2d. The note was given for what Davies had previously stated in writing to be due by him as guardian and trustee. Such debt is fiduciary, and not released by a discharge in bankruptcy: Jones & O'Dowd *vs.* Russell, decided October 31st, 1871; Bankrupt Act, March 2d, 1869, section 33; 6 Int. Rev. R., 61; 2 Bank Reg., 74, 114; Bump Bank, 392.

3d. The taking of the note was not a novation: Code, sections 1743, 2682; Collins *vs.* Collins, decided Sept 5th, 1871.

JOHN T. SHEWMAKE, by brief, for defendant. Treating the account and note as same cause of action, the case is subject to Ordinance of 1865, and as a liberal discretion is therein given to the jury, their verdict ought not to be disturbed: 38 Georgia Reports, 284. But the defendant was released from the former debt: Code, sections 2125, 2811, 2682; 40 Georgia Reports, 487; Chitty on Contracts, 782, 774, 767, 777; 6 Cranch, 253; Code, section 2827; 9 Georgia Reports, 223. Whether the note was accepted in payment of the original account, depends upon the intentions of the parties: 1 Watts & Ser., 92; 2 Dana, 90; Byles on Bills, 184; 15 Sergeant & Rawle, 162. Discharge was in full of all claims: 20 Georgia Reports, 6. The verdict being satisfactory to the Judge below, and involving the adjustment of Confederate demands, will not be disturbed: 13 Georgia Reports, 34, 359, 370; 38 Georgia Reports, 284; 41 Georgia Reports, 208. Such release or discharge may lawfully be made by the husband and wife: 2 Kent's Com., 135, 137; Clancy on Husband and Wife, 104; 14 Georgia Reports, 413. The note was provable in bankruptcy: Sections 33, 34. It was not made while acting in a fiduciary capacity: 13 Georgia Reports, 467.

MONTGOMERY, Judge.

The sole question necessary to be considered in this case is whether, under the facts, the note given by Davies to Coleman was a novation of the original debt, and destroyed its fiduciary character, so as to take it out of the operation of the 33d section of the Bankrupt Act of March 2, 1869, and allow the discharge in bankruptcy of the defendant to release him from the debt. We think that sections 2811 and 2827 of the Code, under the facts, make the acceptance of the note a novation, and destroy the fiduciary character of

ıe debt. Our judgment, therefore, is, the taking of the ıdividual note under seal of a guardian, by the husband of ıe ward, in settlement of the guardian's account, which note payable to the husband as trustee of his wife, and a receipt ı full by husband and wife to the guardian, whereby they re-ıase him "from any and all liability growing out of or con-ected with said guardianship," and the further fact that the ıarriage settlement, under which the husband is trustee, mits the property settled (of which the note is part) to the ·ife for life with remainders over, is a novation of the origi-al debt of the guardian, and destroys its fiduciary charac-:r. And if parol evidence be introduced to show that the arties really intended to discharge the guardian as such, and he Judge, by his charge, leaves the question of discharge to he jury, and they find in the affirmative, this Court will not isturb the verdict.

Judgment affirmed.

LEON GUERIN, plaintiff in error, *vs.* JACOB DANFORTH, defendant in error.

When on the trial of a case substantial justice has been done under the evidence disclosed in the record, although there may have been some errors in the rulings of the Court, the verdict of the jury ought not to be disturbed.

Whether a judgment of foreclosure of a mortgage bars a claimant under purchase from the mortgagor subsequent to the mortgage from setting up defenses which might have been made by the mortgagor, discussed. (R.)

Foreclosure of mortgage. Claim. Statute of Limitations. Before Judge GIBSON. Richmond Superior Court. June Term, 1871.

For the facts of this case see the decisions.

JOSEPH P. CARR, for plaintiff in error. Judgments only bind parties and privies: 3 Ga. R., 298; 22 Ga. R., 349; 3 Ga. R., 460; 29 Ga. R., 743; 27 Ga. R., 64; 27 Ga. R., 347; 1 Greenleaf's Evidence, 189, 536; II. Phillip's Evidence, pp. 14, 16. Persons not parties to suit cannot interpose objections: 3 Ga. R., 174; 19 Ga. R., 14; 25 Ga. R., 383. Foreclosure at law substitute for foreclosure by bill in equity: 35 Ga. R., 271. All subsequent encumbrancers necessary parties: Story's Eq. Plead., 193, 195. Bar or exception to the Statute of Limitations, what constitutes, question for the Court, but the finding of the facts is for the jury: 6 Ga. R., 486; 5 Ga. R., 261.

W. T. GOULD; FRANK H. MILLER, for defendant. Judgment of foreclosure was conclusive on the mortgagor and those claiming under him: 7 Ga. R., 495; 18 Ga. R., 476; 25 Ga. R., 330. Statute of Limitations is a personal plea. Evidence admitted without objection not excluded from the consideration of the jury in the charge: 5 Ga. R., 311; 19 Ga. R., 404: Waddail *vs.* Austin & Holliday, decided September 19, 1871. Claimant estopped from pleading Statute of Limitations: 7 Ga. R., 495; 22 Ga., R., 348; 25 Ga. R., 330. Court in possession of proceedings to foreclose mortgage will do equity: 30 Ga. 775. The verdict for damages was right: 14 Ga. R., p. 27.

WARNER, Chief Justice.

On the 24th day of April, 1861, Raoult executed a mortgage deed to Metcalf on a house and lot in the city of Augusta, to secure the payment of certain described promissory notes therein recited. On the 22d day of March, 1869, Metcalf assigned the mortgage to Danforth. On the 2d day of January, 1865, Guerin and Raoult, who were partners, entered into a written agreement, by which Guerin agreed to pay the balance remaining due by Raoult for the house and lot, mortgaged as aforesaid. On the 5th day of December,

1867, Raoult, the mortgagor, bargained and sold the mortgaged premises to Guerin.

At the January Term, 1870, of Richmond Superior Court, Danforth filed his petition for foreclosure of his mortgage. Raoult pleaded the Statute of Limitations of 1869, which was overruled by the Court, which decision was not excepted to, and at the January Term of the Court, 1871, the judgment foreclosing the mortgage was rendered. An execution was issued and levied on the mortgaged property, when Guerin interposed his claim thereto. On the trial of the claim case, the plaintiff in the mortgage *fi. fa.* read in evidence an agreement, signed by Guerin, dated 20th May, 1869, in which he promised to pay Danforth, the mortgagor, in consideration of his forbearance to press the collection of the money due on the mortgage for twelve months, $100 per month. It also appears in the record that suit was instituted on the notes described in the mortgage by attachment, on the 16th day of December, 1869, (Raoult being a non-resident of the State,) and levied on the mortgaged property. The jury, under the charge of the Court, found the property subject to the mortgage lien, and ten per cent. damages. A motion was made for a new trial, on several grounds, which was overruled by by the Court, and the claimant excepted.

The principal ground of error insisted on in the argument before this Court was as to the ruling of the Court below in relation to the right of the claimant to plead the Statute of Limitations of 1869, against the judgment foreclosing the mortgage, the Court holding that the judgment of foreclosure was *conclusive* upon that question, as against the mortgagor, and those claiming under him.

If this was an original question before this Court, I should have some difficulty in holding according to the general principles of the law, that the claimant was concluded by the judgment of foreclosure of the mortgage against the mortgagor, he not having been a party to that proceeding. It is true he had notice of the mortgage lien when he pur-

chased the property from the mortagor, and purchased it subject to that lien as it appeared on the face of the mortgage; but the point in the case is, whether he was *concluded* by the judgment of foreclosure against the mortgagor from showing when that judgment interfered with his interest in the property, that the debt which the mortgage was given to secure had been extinguished by payment thereof, or by the Statute of Limitations. If the mortgagor, by negligence or fraud, fails to set up his legal defense to the proceeding to foreclose the mortgage, is the claimant concluded from doing so when not a party to that proceeding? If the mortgagor or his special agent fail to set up any defense, it is not competent for any third person to interpose: Code, 3449, but does the judgment of foreclosure *conclude* those who are not parties to that proceeding, who claim an interest in the mortgaged property? As our mode of foreclosing mortgages on real estate is a substitute for a bill in equity, the safer course would undoubtedly be to make all persons interested in the mortgaged property, parties. In Knowles *vs.* Lawton, (18th Georgia Reports, 476,) this Court held, that a judgment foreclosing a mortgage binds not only the mortgagor, but also his vendee, and this it does, although the vendee may not be a party to it. The case of Johnston *vs.* Crawley (22 Georgia Reports, 348) would seem to hold differently, but that case was decided by two Judges only, and when that same case again came before the Court, all the Judges being present, the principle decided in Knowles *vs.* Lawton appears to have been affirmed: 25 Georgia Reports, 316. The Court says in the the last case cited: "According to the views which we have taken of this case, the mortgagors could not have resisted the foreclosure of the mortgages, and the plaintiff in error cannot occupy a more favorable relation to the case. He purchased the property subject to them, and if he wishes to retain it he must pay the mortgages." The rule, established by the unanimous decision of this Court, as I understand it, is that the judgment of foreclosure of the mortgage

t the mortgagor in this case concluded the claimant urchased from him subsequent to the date of the mort- rom pleading the Statute of Limitations against that ent, although he was no party to it, and upon that l I affirm the judgment of the Court below. The ver- as right upon the merits of the case, (*independent of tute of Limitations*,) and although there may have been errors in the ruling of the Court, substantial jus- s been done, and the verdict ought not to be disturbed. the judgment of the Court below be affirmed.

CAY and MONTGOMERY, Judges, concurring.

brother Montgomery and myself are not exactly pre- to say that the judgment of foreclosure is conclusive t the purchaser, who was no party to the judgment. seems to us a violation of principle in holding that a ent against one who has parted with the title at the the petition for foreclosure is filed should bind the of the land, who has no opportunity to have his rights premises adjudged. But however this may be, we the judgment in this case ought to be affirmed; the to sue was in pursuance of a contract made by Guerin e delay, and however the mortgagor might have had a to complain, Guerin is estopped from taking advantage act of indulgence, procured by him and for his conven- This would be grossly unjust. As he procured the he is estopped from saying it was improperly done. A annot blow hot and cold in this way. He must abide at he has led the plaintiff to do. We think, therefore, dgment out to be affirmed.

HENRY E. CLARKE, county treasurer, plaintiff in error, *vs.* SAMUEL LEVY, Ordinary, defendant in error.

The Act of October 30th, 1870, establishing a system of common schools and reorganizing the county boards of education, taken in connection with the Constitution of 1868, abolishing the Inferior Court, and casting its duties upon the Ordinary, is a repeal by implication of section 378 of the Code, making the Ordinaries the treasurers of the boards of education of their respective counties. The treasurer of the county, and not the Ordinary, is now by law the treasurer of the board of education.

Mandamus. County Board of Education. Educational Tax. Before Judge GIBSON. Richmond Superior Court. June Adjourned Term, 1871.

On the 28th day of October, 1871, Samuel Levy, Ordinary, filed his petition for *mandamus* against John A. Bohler, Tax Collector, and obtained an order requiring him to show cause on the 28th day of October, 1871, in term time, why he should not pay over to him the educational tax of said county, amounting to $14,000, alleged to have been levied by said Ordinary, upon the recommendation of the grand jury. It appeared that the amount of $14,000 was ordered to be raised by the Ordinary, and by order of the county board of education, pursuant to the recommendation of the grand jury. The tax was recommended by the grand jury at the Spring Term of the Superior Court, 1871, and collected during that year. On the return day of the order, during the regular Adjourned Term, the Collector answered, admitting the facts set forth in the petition. At the hearing the County Treasurer and county board of education were made parties, with the right to except as if the writ of *mandamus* had issued for or against them. The Court held that the Collector having collected said tax under the assessment of the Ordinary, under the direction of the grand jury, he should pay the same to said Ordinary, taking his receipt therefor as Ordinary and *ex officio* treasurer of the school

funds, first giving each one of his sureties notice of the same. Whereupon Henry E. Clarke, the County Treasurer, excepted.

FRANK H. MILLER, for plaintiff in error.

W. H. HULL; BARNES & CUMMING, for defendant.

McCAY, Judge.

It is very evident that it was the intent of the Legislature, by the Act of 1870, to put the education fund of counties, so far as it came from the State fund, into other hands than the hands of the Ordinary, and it would be no unfair assumption to say that, as it can hardly be supposed it was intended there should be two disbursers of the educational fund, the presumption is that the change was intended to apply also to any fund the counties might raise. But we think section 378 of the Code, making the Ordinary the treasurer is inconsistent with the Constitution of 1868. That instrument makes the Ordinary, in effect, the general manager of the county affairs. It clothes him with the powers and casts upon him the duties of the Justices of the Inferior Court. It would be the duty of the Ordinary to *take* a bond from the disburser of this fund. Perhaps, also, it would be his duty to issue execution against him and his securities for it, if the fund was misapplied. Can he take a bond from himself? Can he perform towards and against himself the duties of the office he holds? We think not. His duties as Ordinary are inconsistent with any such position as disburser of this fund, and this section of the Code fell with the adoption of the Constitution of 1868. The County Treasurer is the proper holder of county monies, and as no other person is specially pointed out, we think the disbursement of the fund belongs to his office.

Judgment reversed.

JAMES S. HAMILTON, plaintiff in error, *vs.* B. A. WILLINGHAM, defendant in error.

When a note was given by principal and security, during the war, which, at the close of the war, was scaled to a gold standard, a new note given by principal alone for the amount thus scaled, and the new note accepted by the payee, in the discharge of the first note, this is a novation of the original contract, and the Relief Act of 1870 is inapplicable to it, and no payment of taxes was necessary.

Novation. Relief Act of 1870. Tax Affidavit. Before Judge GIBSON. McDuffie Superior Court. October Adjourned Term, 1871.

Plaintiff in error brought complaint against defendant in error on a promissory note, dated January 30, 1866, due one day after date, for the sum of $494 32. It appeared from the evidence that the note sued on was given in renewal of a note made in 1863, with security, for about $3,000; that the original note was scaled down to a gold basis, according to a table of values; that the second note was signed by the principal alone. The Court charged the jury as follows: to-wit, "A note given after the war closed for a note payable in Confederate money is a renewal of the old note; and unless there is an entire change of the principal parties, there is no novation, and the cases cited in 40 Georgia Reports, 195, 487, do not apply to this case." The Court further charged the jury that an affidavit that all legal taxes had been paid was necessary to a recovery. The jury found in favor of the defendant, and plaintiff excepted to the charge of the Court.

WILLIAM REESE; CHARLES H. SHCOKLEY, for plaintiff in error.

E. H. POTTLE, for defendant.

)NTGOMERY, Judge.

e facts of this case show a clear novation under Revised , sections 2125 and 2827. The release of the surety by rincipal, the forbearance to sue, and the acceptance of a note, scaled down, when taken together, was such a new leration, moving from the payee of the note to the r, as to bring the case fully within the provisions of the ns of the Code referred to, and to sustain the judgment nounced in the syllabus, that when a note was given by ipal and security, during the war, which, at the close of ar, was scaled to a gold standard, a new note given by ipal alone for the amount thus scaled, and the new note ted by the payee, in the discharge of the first note, this ovation of the original contract, and the Relief Act of is inapplicable to it, and no payment of taxes was neces-

dgment reversed.

REN, LANE & COMPANY, plaintiffs in error, *vs.* WILSON C. HEWITT, defendant in error.

ecutory contract for the sale of goods, to be delivered at a future where both parties are aware that the seller expects to purchase self to fulfill his contract, and no skill and labor or expense enters the consideration, but the same is a pure speculation upon chances, ntrary to the policy of the law, and can be enforced by neither y. But where such a contract is executed, an agent employed by principal to make the contract can recover from him any money ay have advanced in the transaction by his authority, or without ority, if the principal, after such advance, ratify his agent's act aking it.

e for future delivery. Policy of law. Illegal Consid- n. Ratification. Principal and agent. Before Judge ON. Richmond Superior Court. June Term, 1871.

Wilson C. Hewitt brought complaint against Warren, Lane & Company for the recovery of $2,000 on a due bill, and $2,000 on an account for cash, paid to said Warren, Lane & Company to invest in cotton for said Hewitt. The defendants pleaded to said action that, on December 21st, 1869, they received from said plaintiff $2,000, to be used as a margin in the purchase for plaintiff of two hundred bales of cotton for future delivery; that on or about December 29th, 1869, said defendants, by Messrs. J. Henly Smith & Company, of Baltimore, purchased in said city, for said plaintiff, two hundred bales of cotton, to be delivered in April following; that on or about February 24, 1870, the decline in cotton made it necessary that an additional $2,000 margin should be deposited, and that defendants, by direction of plaintiff, supplied the requisite margin, on February 26th, 1870, in payment of the due bill sued on; that subsequently the further decline in cotton rendered an additional margin necessary, which plaintiff declined to put up, and said cotton was sold. The defendants further pleaded that said plaintiff was indebted to them in the sum of $1.278 24, balance due after crediting plaintiff with the $2,000 sued for. It appeared from the evidence that, on the 21st of December, 1869, Hewitt gave to Warren, Lane & Company, factors and commission merchants, of Augusta, $2,000, to be invested in cotton, to be delivered in April following. On December 21st, 1869, defendants sent by express to J. Henly Smith & Company, of Baltimore, $3,000 in gold, with instructions to hypothecate it for currency, and to hold $2,000 of the currency, as a margin for two hundred bales of cotton, which Smith & Company were instructed to purchase for a customer of defendants, to be delivered in April, 1870. On December 24th, 1870, defendants borrowed from plaintiff $2,000 for which they gave their due bill. On December 29th, 1869, Smith & Company purchased in Baltimore two hundred bales of cotton, at twenty-five and three-fourths

cents per pound, to be delivered in April, 1870, at seller's option. In February, 1870, Smith & Company called for an additional margin, and, on February 26, 1870, said additional margin of $2,000, was furnished by said defendants, and Smith & Company notified that the person for whom the cotton was purchased declined to put up any more. On March 2d, 1870, the cotton was sold, at a loss of $5,016 27, which was paid by defendants. When the cotton was ordered plaintiff's name was not disclosed. On May 16th, 1870, plaintiff commenced this action on the due bill. At the June Term, 1870, the petition was amended, and the $2,000 first deposited with defendants to invest in cotton was sued for. During the examination of Henry F. Russell, Esq., a witness for the defendant, the Court asked said witness to explain the character of these transactions, and remarked that it was made his duty to recommend amendments to the Penal Code, and, at the same, addressed William A. Walton, Esq., one of defendant's counsel, and called his attention to section 2596 of the Code, saying that the section was in the wrong place; that it ought to be among the penal laws. The jury found for the plaintiff $2,000, without interest, and canceled the claim of defendants against plaintiff. A motion was made for a new trial, which was overruled by the Court. Whereupon defendants excepted upon the following grounds, to-wit:

1st. Because the verdict of the jury is contrary to law and the justice and equity of the case.

2d. Because said verdict is contrary to evidence and the weight of evidence, and without sufficient evidence to warrant the finding.

3d. Because the Court erred in charging the jury, at the request of plaintiff's counsel, "that if defendants contracted for a sale of cotton, to be delivered plaintiff at a future day, and both parties were aware that the defendants expected to purchase themselves to fulfill their contract, and no skill and labor, or expense, entered into the consideration, it was a spec-

ulation upon the chance of the rise of cotton, and cannot be enforced."

4th. Because the Court erred in charging the jury, at the request of plaintiff's counsel, "that a due bill for borrowed money can be recovered on, however illegal the other features of the transactions between the parties may be."

5th. Because the Court erred in charging the jury, as re-requested by plaintiff's counsel, that, "where an agreement is entered into between parties in Georgia, to be carried into effect in New York or Maryland, it is to be controlled by the laws of Georgia, unless it is made to appear that the laws of New York or Maryland are different from those of Georgia, and the *onus* is upon the defendant to shew it."

6th. Because the Court erred in refusing to charge the jury, as requested by defendants' counsel, "that the law presumed that parties contract with reference to the law, and do not intend to violate it, and it is incumbent upon the parties who allege that the contract was illegal, to prove it."

7th. Because the Court erred in charging the jury as follows: "If, after you have considered the evidence, you shall be of opinion that this is a contract for the future delivery of cotton or not, at option of seller, it is contrary to public policy, and cannot be enforced in the Courts; therefore, if the defendants have advanced money for such a purpose, it cannot be recovered, neither can the plaintiff recover back from defendants any sum advanced by him for such a purpose, if invested as requested. If a party selling may or may not deliver, but settle the difference, it is nothing more or less than betting on the price of cotton, at a given time in the future, and must, at least, be a pure speculation on chances; and, therefore, contrary to the policy of the law. If, then, in pursuance of the contract made between Hewitt and Warren, Lane & Company, in December, 1867, Warren, Lane & Company purchased, in Baltimore, through Smith & Company, two hundred bales of cotton for future delivery in April, at the option of the seller, it is a contract against

he policy of the law, and cannot be enforced, or any portion f it, by either party, and the sum advanced by defendants, r commissions claimed for the same, cannot be allowed."

8th. Because the Court erred, and made an impression on he jury adverse to defendants, in this, that during the exmination of Henry F. Russell, a witness for the defendants, he Judge asked said witness to explain the character of these ransactions, meaning the buying cotton for future delivery, nd remarked that it was made his duty to recommend amendnents to the Penal Code, and, at the same time, addressed Villiam A. Walton, Esq., one of defendants' counsel, and alled his attention to section 2596 of the Code, saying that t, the section, was in the wrong place; that it ought to be mong the penal laws; all which was said by him in the resence and hearing of the jury, and was calculated to make he jury believe that defendants' conduct was obnoxious to he provisions of said section of the Code.

W. H. HULL; J. C. C. BLACK, for plaintiffs in error. The harge referred to in the 6th ground was law, and applicable: 6 Ga. R., 162; 19 Ga. R., 75. The 3d, 5th and 7th grounds nvolve Code, section 2596, and its applicability to the case. That section is not the law of this case. The contract beween Hewitt and the seller of the cotton was not a Georgia ontract. Our Court will presume that the common law preails in the other States: 34 Ga. R., 407; Story on Contracts, ol. 2d, sec. 776. If it was valid in Maryland, it is valid verywhere: 2 Ga. R., 165. If section 2596 of the Code as applicable to the original transaction, this would not prevent Warren, Lane & Company from recovering the money aid for Hewitt: 2 Wilson R., 309; 4 Burrows R., 2069; 11 Wheaton R., 272; 3 Ga. R., 176; 30 Ga. R., 547. If there ad been a profit, and it had been paid to Warren, Lane & Company, they could not set up the illegality of the original ransaction to defeat Hewitt's recovery from them: 1 Boss. nd Pull. R., 3; 11 Wheaton R., 592; 12 Howard, 79; 18

Howard, 510; 2 Wallace, 79. As to the 8th ground, see Code, section 3183; 34 Ga. R., 263; 37 Ga. R., 218; 38 Ga. R., 73. The statute is imperative: 39 Ga. R., 603. This transaction has no shadow of illegality at common law: Benjamin on Sales, 60; 2 Bingham New Cases, 722.

JOSEPH P. CARR; FRANK H. MILLER, for defendant: 1st. A parol contract to purchase cotton for future delivery, made in Georgia, is void: Code, sections 2596, 2169; Hamberger *vs.* Powell, decided September 5th, 1871. 2d. A contract void in Georgia is void everywhere: Law Times, Oct., 1871, 189; In Re. Conrad, Story C. L., 243. 3d. The legal features of a contract can be enforced, however illegal the others are: 39 Ga. R., 531; 41 *Ibid.*, 331; Code, sec. 2707. 4th. The law of the place of performance must be shown to be different from the law of Georgia, otherwise the law of Georgia construes the contract: 38 Ga. R., 129; 31 *Ibid.*, 210; 41 *Ibid.*, 449; 37 *Ibid.*, 428; 34 *Ibid.*, 415. 5th. If the finding of the jury was right under the law applicable to the statement of facts in the record, it should not be disturbed: 42 Ga. R., 249; 40 *Ibid.*, 254; 35 *Ibid.*, 54.

MONTGOMERY, Judge.

This was a suit by the defendant in error to recover the amount of a due bill for $2,000, borrowed by the plaintiffs in error.

A set-off was filed, which originated as follows: On December 20th, 1869, Hewitt employed Warren, Lane & Company, as factors and cotton brokers, to purchase two hundred bales of cotton for him, to be delivered in April following, "at seller's option." He placed $2,000 in their hands as a "margin." The cotton was purchased in Baltimore, through a commercial house of that city, and the "margin" deposited with that house. The purchase was made December 29th. On December 24th, Hewitt loaned Warren, Lane & Company $2,000 more, for which they gave the due bill sued on.

In February, the Baltimore firm notified Warren, Lane & Company that, owing to the decline in cotton, the margin was exhausted, and called for a further margin. Warren, Lane & Company telegraphed that it would be made good, before seeing Hewitt. They afterwards (the next day) saw him and told him what they had done. One of the firm of Warren, Lane & Company testified that Hewitt acquiesced. Hewitt, however, denies this. At all events they sent on $2,000 as a further margin. In March, cotton still declining, they were again telegraphed by their Baltimore correspondents that a further margin was required. They informed Hewitt, and he declined to have anything further to do with the transaction. The cotton was then sold at a loss of about $5,200—the balance of which, some $1,200, Warren, Lane & Company paid. And this sum, together with the $2,000 sent forward in February, they pleaded as a set-off to the due bill, and seek to recover the balance.

The Judge, in his charge to the jury, and in his judgment refusing a new trial, treats Warren, Lane & Company as a principal party to the transaction, and as selling the cotton to Hewitt. This error is fundamental. The evidence shows that they only acted as his agents in effecting the purchase in Baltimore. The transaction for the purchase of the cotton was clearly such as indicated in section 2596 of the Code, and would not have been enforced, as between Hewitt and the seller, in favor of either party.

1. But where that transaction has been completed, and Warren, Lane & Company seek to recover advances made by them, in good faith, as the agents of Hewitt, which advances were authorized or ratified by him, we think they are entitled to do so. Had a profit been made on the transaction, and had such profit come into the hands of Warren, Lane & Company, as it would have done, the authorities are clear, that Hewitt could have compelled them to pay it over to him: 18 Howard, 510; 2 Wallace, 79; Tenant *vs.* Elliott, 1 Bos. and Pul., 3; Farmer *vs.* Russell, *Ib.*, 296; Thomson

vs. Thomson, 7, Ves., 473; Sharpe *vs.* Taylor, 2 Phillips Ch., 801. See McBlair *vs.* Gibbs, 17 Howard, 232; *Ingram vs. Mitchell*, 30 Ga., 547. And where money is lent for the payment of a debt originating in a contract, *which the law would not have enforced*, it can be recovered back: Alcinbrook *vs.* Hall, 2 Wils., 309; Barjeau *vs.* Walmsley, 2 Str., 1249. See Armstrong *vs.* Toler, 11 Wheaton, 272. If the law refuses to enforce a contract on the ground that it is against public policy, it does not necessarily follow that such contract is illegal. A parol contract for the sale of lands will not be enforced, as against public policy. But no one ever thought of calling such a contract illegal. Money loaned to pay for land so contracted for could certainly be recovered, though the lender knew the purpose for which it was borrowed. It is true, that where a statute makes the payment of money on a certain class of contracts an *unlawful act* and *attaches a penalty thereto*, the Court of King's Bench have decided that money lent to make such payment, with knowledge of the purpose on the part of the lender, cannot be recovered: Cannon *vs.* Bryce, 3 Barn. and Ald., 179. But the Court is careful to draw the distinction between the statute then under consideration, which "absolutely prohibited the payment of money," and the statute against gaming, which "contains no prohibition against the payment of money lost at play." And hence, money loaned to pay a debt of this latter class has been held to be recoverable. The distinction is, perhaps, narrow, but is fully supported by the authorities.

It is to be noted that the contract for the purchase of this cotton is not such an one as the Judge, who tried this case, supposes, to-wit: one in which it was at the option of the seller to deliver or not as he pleased. Cotton sold to be delivered in any given month "at seller's option," means that *the time of delivery*, within the month, is at the option of the seller, not that he may deliver or pay the difference between the contract price and the market price at the time of delivery. The witnesses, Russell and Sibley, are explicit on

this point, and the meaning here given to the phrase is the known commercial acceptation of the term. Such a contract, as Judge Gibson supposes this one to have been, not being before us, no opinion as to its validity or the validity of any collateral engagements growing out of it is expressed. This contract for the purchase of the cotton, then, not being illegal, but only one which it is not the policy of the law to enforce, Warren, Lane & Company, in our opinion, are entitled to recover all authorized advances made by them as Hewitt's agents and those made without authority from him, if he afterwards ratified their action in making the advances. The judgment of the Court below is therefore reversed, on the ground that the Court erred in charging the jury that "the sum advanced by defendants, or commissions claimed for the same, cannot be allowed;" this Court being of opinion that it should be left to the jury to say whether Hewitt authorized or ratified the action of his agents in making the advances, and if he did, they were entitled to have their set-off allowed to the extent of the authority given, and the ratification.

EDMOND G. SCRUGGS, plaintiff in error, *vs.* WILLIAM GIBSON and CICERO GIBSON, administrators, defendants in error.

When a set-off had been pleaded to the plaintiffs' action, it was error to allow the plaintiffs, on their own motion, to dismiss their own action, on the ground of their own default in not having paid all legal taxes on their own debt, as required by the Act of 1870.

Set-off. Tax affidavit. Relief Act of 1870. Dismissal of suit. Before Judge TWIGGS. Glasscock Superior Court. September Term, 1871.

William Gibson and Cicero Gibson, as administrators upon the estate of Sterling Gibson, deceased, brought complaint

against Edmond G. Scruggs, upon a promissory note, dated January 1st, 1862, and due one day after the date thereof. The defendant pleaded as set-off a counter-claim against plaintiffs exceeding the demand sued on, and asked judgment for the surplus. The case being called for trial, the plaintiffs moved to dismiss the action because the affidavit of the payment of taxes had not been filed, as required by the Act of 1870. The defendant objected upon the ground that the plea of set-off filed exceeded in amount the demand of plaintiffs, and that he waived all advantage that might be taken on account of failure to file the tax affidavit. The Court allowed the action to be dismissed, and defendant excepted.

E. H. POTTLE, by brief, for plaintiffs in error.

C. S. DUBOSE; CARSWELL & DENNY, for defendants.

WARNER, Chief Justice.

The plaintiffs in the Court below brought an action on a promissory note against the defendant, who filed a plea of set-off. On the trial of the case the plaintiffs made a motion to dismiss their own suit on the ground of their own default in not having filed an affidavit that all legal taxes had been paid on their own debt, as required by the Act of 1870. The defendant resisted the motion, on the ground that he had pleaded a set-off for a larger amount than the plaintiffs' demand, and expressly waived any and all right to demand that an affidavit of payment of taxes should be made or filed, as required by the Act of 1870. The Court dismissed the plaintiffs' action, and the defendant excepted.

In our judgment it was error for the Court to dismiss the plaintiffs' action, on their own motion, against the consent of the defendant, on the statement of facts disclosed in the record: Code, section 2856. Whatever else may be said of the Act of 1870, it cannot reasonably be claimed that it was intended to allow parties to take advantage of their own wrong.

Let the judgment of the Court below be reversed.

JORDAN F. VEAL, plaintiff in error, *vs.* ANDREW J. VEAL, administrator, defendant in error.

1. When in a proceeding under sections 4005, 4013 of the Code, against one as a tenant holding over, the defendant denies the tenancy, and sets up that he entered as the owner, and not as tenant, and an issue is formed and on trial, and the assumed landlord dies, and his administrator is made a party, the defendant cannot be sworn as a witness in his own behalf, unless for the special purpose of proving some fact transpiring since the death of the alleged landlord.
2. The verdict of the jury in this case, though not entirely satisfactory, is yet not so contrary to the testimony as to justify this Court in overruling the judgment of the Judge refusing a new trial.

Proceeding against tenant holding over. Motion for new trial. Evidence. Before R. L. WARTHEN, Esq., presiding by consent. Washington Superior Court. October Adjourned Term, 1870.

Andrew J. Veal, as guardian for his father Edward Veal, made affidavit on the 11th day of February, 1870, that he was the legal owner of a certain tract of land situated in Washington county, and that Jordan F. Veal was then occupying said land by sufferance; that deponent had demanded possession and said Jordan had refused to deliver the same to him. Whereupon, the usual warrant for the possession of the land issued. Jordan F. Veal made a counter-affidavit, and the case was returned to Washington Superior Court. Edward Veal having, in the meantime, died, Andrew J. Veal, as his administrator, was made the party plaintiff by consent. The cause being at issue, was submitted to a jury, who found for the plaintiff. A motion was made by defendant for a new trial, which was overruled by the Court. Whereupon, plaintiff excepted, upon the ground, among others, that the Court erred in refusing to admit Jordan F. Veal as a witness in his own behalf, the other party to the contract being dead.

LANGMADE & EVANS, for plaintiff in error.

JOHN N. GILMORE; CARSWELL & DENNY, for defendant.

McCAY, Judge.

The issue in this case is made by the two affidavits. The plaintiff's affidavit declares that the defendant is the tenant of the deceased. The defendant's affidavit denies this, and that alone is the issue or cause of action on trial. It seems to us, therefore, that the defendant comes directly within the exception in the Evidence Act. The issue or cause of action on trial is whether the defendant was the tenant of his father, and the father being dead, the case comes almost within the words as well as the spirit of the exception: Code, sec. 3798.

We should have been, perhaps, better satisfied with this verdict had it been for the other side. But it is not *decidedly* and *strongly* against the weight of evidence. We, too, are not a jury, and it would strike at the very root of the right of trial by jury if the Courts were to interfere in every case where they disagreed with the jury as to the proper verdict in a given case. The verdict must be such as to show passion, prejudice, etc. If calm, honest men may differ as to the proper verdict, the Courts ought not to interfere.

Judgment affirmed.

T. N. BEALL, administrator, plaintiff in error, *vs.* EDWARD J. COATS, principal, and W. E. CARSWELL and JOHN SMITH, securities, defendants in error.

An affidavit to open a judgment, upon the sole ground that the defendant is willing to return to the plaintiff in *fi. fa.* the property, the purchase of which created the debt on which the judgment is founded, should have been dismissed and the sheriff ordered to proceed with the sale.

Relief. Tender. Motion to open judgment. Before Judge ROBINSON. Wilkinson Superior Court. April Term, 1871.

On the 29th day of November, 1869, an execution issued from Wilkinson Superior Court, in favor of plaintiff in error,

against defendants in error, for the sum of $2471.00, besides interest and costs. This execution was levied upon a certain tract of land, as the property of Edward J. Coats, on February 27th, 1868. On the 11th day of February, 1869, Edward J. Coats made affidavit that "said *fi. fa.* was issued upon a judgment entered upon a contract made prior to June 1st, 1865, and that defendant makes this affidavit in order to obtain the benefits of 'An Act for the relief of debtors, and to authorize the adjustment of debts upon the principles of equity.'" At the April Term, 1869, said defendant in error moved to have said judgment opened, upon three grounds, the second of which was as follows: "Defendant further states that said contract was a note given for land purchased by defendant from plaintiff; that this defendant still has said land in possession, in his own right, and that he is and has been willing to return the same, with just and reasonable compensation for the use, rents and profits thereof, for the time the same has been in the possession of this defendant." The Court overruled the first and third grounds and sustained the second, whereupon plaintiff in execution excepted.

J. RUTHERFORD; J. WINGFIELD; E. CUMMING, for plaintiff in error.

J. G. OCKINGTON; F. CHAMBERS, by brief, for defendants.

MONTGOMERY, Judge.

This was an effort made by one of the defendants, (the principal in the debt sued on,) to avail himself of the provisions of the third section of the Relief Act of 1868. That section does not vary essentially, so far as defendant in this case attempts to avail himself of it, from the proviso to the fifteenth section to the Relief Act of 1870. That has been declared by this Court to be unconstitutional, in Abercrombie *vs.* Baxter, decided October 17th, 1871. The third section of the Relief Act of 1868, so far as applicable to cases like the present, must share the same fate. See, also, 42 Georgia, 61.

Our judgment, therefore, is that an affidavit to open a judgment upon the sole ground that the defendant is willing to return to the plaintiff in *fi. fa.* the property, the purchase of which created the debt on which the judgment is founded, should have been dismissed and the sheriff ordered to proceed with the sale.

Judgment reversed.

JAMES A. WILSON *et al.*, plaintiffs in error, *vs.* A. A. BELL, administrator, defendant in error.

A widow dying within less time than one year after administration on the estate of her deceased husband, without having made her election to take a child's part of the real estate, in lieu of her dower, her administrator is not entitled to receive or to recover such child's part after her death.

Distribution. Election by widow. Before Judge ROBINSON. Morgan Superior Court. March Adjourned Term, 1871.

This case was an appeal from the Court of Ordinary upon the distribution of the estate of Briggs H. Moultrie, deceased. Briggs H. Moultrie departed this life in August, 1862, intestate, leaving a widow and six children. His widow, Mary J. Moultrie, died in April, 1863. The defendant in error was appointed administrator, *de bonis non*, on the estate of Briggs H. Moultrie, in March, 1869. The commissioners appointed to make the distribution set apart to the administrator of Mary J. Moultrie one-seventh of the entire estate, she never having elected, during life, to take a child's part. The remainder of the estate was divided equally between the six children. The Ordinary confirmed this appointment, and an appeal was entered to the Superior Court. There being no question of fact involved, the case was submitted to the

Court. After argument had, the decision of the Ordinary was affirmed. Whereupon, four of the said children, being by a former wife of said Briggs H. Moultrie, deceased, excepted, and assign said ruling as error.

A. G. & F. C. FOSTER, for plaintiffs in error, cited Prince's Digest, 229; Cobb's New Digest, 230; 9 Ga. R., 189.

MCHENRY & MCHENRY, for defendant, cited Code, sections 2220, 2448, 2447; 9 Ga. R., 189.

WARNER, Chief Justice.

This case came on to be heard in the Court below on an appeal from the Court of Ordinary. It appears, from the record, that Moultrie died intestate, in August, 1862, leaving a widow and six children, four of whom were by a former wife, and two by the wife living at the time of his death. In April, 1863, the widow of Moultrie died intestate, and Reid was appointed administrator on her estate. The widow died within the time allowed by law for making her election to take a child's part of the real estate of her deceased husband, in lieu of dower, and without having made such an election. The Court decided that, in the distribution of the real estate of Moultrie, the intestate, that the administrator of his widow was entitled to receive one share—that is to say, one-seventh part thereof. This was error, according to the ruling of this Court in Beavors *vs.* Winn *et al.*, 9 Georgia Reports, 189. The decision of the Court in that case controls the question made by the record in this case.

Let the judgment of the Court below be reversed.

JOE DURHAM, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

In a murder trial, if the State prove by cross-examination of a witness for the defense, that "not a negro in the neighborhood was friendly to prisoner" (who was himself a negro) and the evidence of guilt rests solely on the testimony of one witness, who was also unfriendly to prisoner, and the prisoner offer to prove the cause of his unpopularity with his own race, he should be permitted to do so.

Criminal law. Murder. Principal in the second degree. New trial. Before Judge ROBINSON. Greene Superior Court. September Term, 1871.

The plaintiff in error, a person of color, was indicted as principal in the second degree to the murder of Jeff Chennault. Upon the trial, Felix Gresham, a material witness for the plaintiff in error, upon cross-examination by the State, testified that "not a negro in the neighborhood was friendly to prisoner." Plaintiff in error then proposed to prove the cause of this unfriendly feeling, and the Court excluded the evidence. The jury found plaintiff in error guilty of murder as principal in the second degree. Whereupon, plaintiff in error moved for a new trial upon several grounds, the first of which it is only necessary to an understanding of the decision of the Court, hereto set forth, to-wit:

1st. Because the Court erred in refusing to allow defendant's counsel to prove the cause of bad feeling between defendant and the deceased, previous to the difficulty, and also the cause of bad feeling between the defendant and the colored witnesses for the State, after it had been proven that this bad feeling existed. The motion for a new trial was overruled, and plaintiff in error excepted.

EDWARD L. LEWIS, by brief, for plaintiff in error, cited 31 Ga. R., 167; 28th, *Ibid.*, 200; 1st Chitty's Criminal Law, 258; 12 Ga. R., 500.

EMMING JORDAN, Solicitor General, by brief, for the

ONTGOMERY, Judge.

e only assignment of error we deem it necessary to no-
n this case is the refusal of the Court to permit the
ner, after the State had shown his unpopularity with his
race in the neighborhood, to prove the cause of the ill-
g towards him. In this we think the Court erred, the
especially as the only witness who testified to the pris-
s guilt was himself proven to be unfriendly to him.
the jury known the cause of this unfriendly feeling,
would have been better able to estimate the weight of
stimony against the prisoner.
t the judgment be reversed.

. FOSTER, plaintiff in error, *vs.* EARLY W. THRASHER, defendant in error.

in a contest between judgment creditors, in the distribution of
ey raised from the sale of defendant's property, it was offered to
e the sayings of defendant, that the judgment of one of the credi-
was paid, and it was alleged that there was proof of a conspiracy
een the defendant and that creditor to keep open the execution
the intent to defraud other creditors:
that the evidence was properly rejected, there being no proof of a
piracy at the time the sayings sought to be proven were made.
case the evidence justifies the verdict, since, even admitting that
older *fi. fa.* is to be credited with $17,000 in 1864, there is still
e due, apparently, upon it than the jury have found, even if the
y proved is a proper deduction, which we do not admit.

ney rule. Evidence Usury. Before Judge ROBINSON.
an Superior Court. March Adjourned Term, 1872.

ly W. Thrasher held an execution against Baldwin Cope-
issued from Green Superior Court, September Term, 1860,

for $15,989.52. A. G. Foster held an execution against said Copeland, issued from Greene Superior Court, March Term, 1863, for $4,039.09, principal, and $620.44, interest. Foster's execution was levied upon a house in Madison, on November 1st, 1867, which was sold by the sheriff on January 7th, 1868, for net sum of $2,159. In August or September, 1863, Copeland paid to Thrasher $17,000 in Confederate money, taking receipt for the same. This amount was not credited upon the execution because it was not at hand. After the sale Thrasher and Copeland agreed that the $17,000 Confederate currency should be counted as only $10,000. Thrasher entered a credit of that amount on the execution on March 19th, 1869, as of September, 1863. Foster contended that Thrasher's execution was fully paid off and discharged. An issue was formed and submitted to a jury. There was some evidence introduced as to there being usury in the original indebtedness from Copeland to Thrasher. Foster sought to prove the sayings of Copeland in the absence of Thrasher, as to the payment of the execution, upon the alleged ground that there existed a conspiracy between Thrasher and Copeland to keep the execution open, with intent to defraud other creditors. The jury found due to Thrasher upon his execution $2,407.48. A motion was made for a new trial, which was overruled by the Court, whereupon plaintiff excepted upon the following, among other grounds: "1st. Because a new trial was refused upon the ground that the verdict was contrary to evidence and principles of justice and equity. 2d. Because a new trial was refused on the ground that the verdict was contrary to the following charge of the Court: "The effect of usury is to annul and make void the contract for the usury, the lender having the right to recover the principal sum, with legal interest." 3d. Because a new trial was refused on the ground that the Court erred in refusing to allow the sayings of Copeland to be given in evidence."

A. G. & F. C. FOSTER; J. A. BILLUPS, for plaintiff in error. 1st. A new trial should be granted because the verdict is contrary to the evidence: Code, sections 3662, 3666; 15 Georgia Reports, 565; 17 Georgia Reports, 228; 18 Georgia Reports, 367; 19 Georgia Reports, 145; 20 Georgia Reports, 135, 671, 652; 24 Georgia Reports, 591; 25 Georgia Reports, 576; 26 Georgia Reports, 325, 360; 30 Georgia Reports, 1, 116. 2d. The sayings of Copeland admissible: Code: section 3663.

A. REESE; THRASHER & THRASHER, for defendant.

McCAY, Judge.

The evidence offered of the sayings of the defendant during the war, that he had, a few days before, paid this judgment, was, as it seems to us, properly rejected. It was in no sense part of the *res gestæ*, since it was, to say the least of it, several days after the act is claimed to have been done. Nor was it admissible as the sayings of one of several conspirators. We recognize the rule, that if you establish a conspiracy to defraud the other creditors, between one creditor and the debtor, the sayings of one may be good against the other. But the declaration must be made during the existence of the conspiracy. Even a conspirator is not bound by the sayings of his fellow, at a period when the conspiracy did not exist. There is no pretense here of any evidence that there was any combination between these parties at the time this declaration of the defendant was made. Indeed, it, upon its very face, implies that at that time no such combination existed.

We see no reason to disturb this verdict. Putting the case in the strongest light against the verdict, the *fi. fa.* is still open for as much as the jury have found, even though the usury be deducted. We are not prepared to say that *creditors have a right* to set up usury between the debtor and a

creditor, which has been reduced to judgment. We incline to think not; but as the verdict is sustainable in any event, we will not go into that subject.

Judgment affirmed.

BRIGGS H. NAPIER and ELIZABETH J. NAPIER, plaintiffs in error, *vs.* ELIJAH E. JONES, defendant in error.

1. If, in a suit against a guardian, by his ward and her husband, for wasting the ward's estate, long and complicated accounts, running through a series of years, are submitted to the jury without having been referred to an auditor, and the Judge charges the jury correctly as to the liability of the guardian for mixing his ward's funds with his own, but the record does not show that the Court was requested to instruct them, or that he did instruct them, as to the rules by which they were to be guided in making their calculations as to the proper credits to be allowed the guardian in his disbursements, the items of which are not specifically surcharged and falsified, and they return a verdict in favor of complainants for a round sum, not indicating the process by which they arrived at the result, this Court will not undertake to say, at the instance of the complainants, that the verdict is contrary to evidence, and the principles of justice and equity, or to the charge of the Court. Nor will the Court grant a new trial on the ground that the verdict is contrary to law, where no such assignment of error appears in the record.
2. Where such accounts are so submitted to the jury, and the accounts run through the entire period of the war, involving the receipt and payment of large sums of Confederate money by the guardian, the jury will be allowed a liberal discretion in adjusting the equities between the parties, under the Ordinance of 1865, and this Court will not scan too critically the result at which they arrive, no bad faith appearing on the part of the guardian.
3. The law allowing compound interest to be charged against trustees after six years, and annually thereafter, in certain specified cases, was suspended during the war by Act of December 6th, 1862, which takes precedence of the Code by Act of December 13th, 1862.
4. The returns of a guardian, made in good faith, are only *prima facie* evidence against him, and may be explained by parol evidence. In the charge upon this point the Court erred, but it was in favor of complainants.

5. The remaining errors complained of, conceding them to be errors, were immaterial, and could not have influenced the verdict.

Guardian and ward. Assignment of error. Ordinance of 1865. Compounding interest. Before Judge ROBINSON. Morgan Superior Court. March Term, 1871.

Plaintiffs in error filed their bill against defendant in error and charged that Elizabeth J. Napier, the wife of Briggs H. Napier, is the grand-daughter of defendant in error, and also of one Elias Reid, formerly of the city of Savannah; that Elias Reid died in the year 1854, leaving a large estate, one-half of which was bequeathed to said Elizabeth J. Napier and her brother and sister; that during the same year defendant in error was appointed guardian of his said three grandchildren, and possessed himself of one-half of the estate of said Elias Reid, deceased, amounting in value to about $70,000; that defendant in error used and employed the means held by him as guardian in speculations for his own benefit, and especially in the purchase of a plantation for himself in the county of Bartow, known as Stilesborough; that Elizabeth J. Napier resided with the defendant in error most of the time from his appointment as guardian to the occasion of her marriage, in April, 1865; that during the years 1862, 1863, 1864 and 1865, defendant in error claims to have paid out for his said ward the sum of $8,020.73; whereas, plaintiffs in error stand ready to prove that less than $800 in currency, equal to that received by defendant in error, would have paid for more than the said Elizabeth J. obtained during the last named years; that during the spring of 1865, or the previous winter, defendant in error handed to the said Elizabeth J. Confederate Treasury notes to the amount of some $4,000, stating that it was her money, and urged her to go to the city of Augusta and purchase clothing; that subsequently he advised her against attempting this trip on account of the movements of General Sherman; that these notes remained in her possession until they were utterly

worthless; that defendant in error claims a credit for the amount of said notes. The bill contained many similar additional charges, which it is not necessary to set forth. The prayer was that the payments in Confederate money might be set aside; that a pretended settlement, fraudulently obtained by defendant in error with plaintiffs in error, be decreed null and void; that a full and fair account be had. To this bill was attached a long and complicated account between the defendant in error and his wards, commencing in 1854 and running through a series of years to October, 1865. The answer of defendant in error denied all the charges of fraud, and gave a history of his acts as guardian; set up the actual necessity of receiving Confederate money during the war, etc. The case was submitted to a jury without any previous reference to an auditor.

The jury returned a verdict for plaintiffs in error for the sum of $2,000. A motion was made on behalf of plaintiffs in error for a new trial, which was overruled by the Court, and they excepted upon the following, among other grounds, to-wit:

1st. Because the Court erred in refusing to grant a new trial on the ground that the verdict was for a much smaller sum than the evidence showed to be due.

2d. Because the Court erred in refusing to grant a new trial on the ground that the Court erred in allowing the defendant to give in evidence his conduct in reference to the negroes, Mary and her child, Levenia, after their sale by him as guardian.

3d. Because the Court erred in refusing to grant a new trial on the ground that the verdict was contrary to the charge of the Court, such parts of said charge as is material being in substance as follows, to-wit: That a return made to the Court of Ordinary, by the defendant, as guardian, charging himself with the proceeds arising from the sale of negro property, as of the first of January, 1860, is binding, unless he be relieved therefrom by the judgment of some

Court having competent jurisdiction of the matter; that where the defendant received the ward's money, and mixed it with his own, and used it for his own purposes, he is liable for the amount so received, with interest thereon, at the value of the money at the time of its reception.

A. G. & F. C. FOSTER, for plaintiffs in error, cited 2 Story's Eq. Ju., 1273, 1273(*a*) and 1274; Hill on Trustees, 579, 611, 612, 613; 38 Ga. R., 311; 39 *Ibid.*, 101; 24 *Ibid.*, 578; Code, sec. 2562; 29 Ga. R., 102; 11 *Ibid.*, 258; Code, secs. 3700, 3703, 3704.

REESE & REESE, for defendant, cited: Compounding suspended by Act of March 6th, 1862: Pamphlet, Nov. and Dec., 1862, and March and April, 1863, p. 30. Power of trustee to receive Confederate money and liability: Acts of 1862 and 1863, p. 143; Acts of 1863 and 1864, p. 29; Acts of 1865 and 1866, p. 88; 4th section of Relief Act of 1868. Rule of conduct of trustees: 38 Ga. R., 304; 39 *Ibid.*, 96; 41 *Ibid.*, 439; 42 *Ibid.*, 135.

MONTGOMERY, Judge.

This case was an attempt by the plaintiffs in error to hold the defendant in error liable as guardian of the wife of Napier for mismanagement of his ward's estate.

1. The guardian's accounts were long and complicated, running through a series of years, embracing the whole period of the war. The waste charged was that he had mixed his ward's funds with his own; that he had credited himself with Confederate money paid during the war, to make the credit side of his account balance the debt side, for which he was liable in gold; that he sold a couple of negroes for $1,500, for one-third of which he was liable to complainant's wife, and had failed to account for them, and that after the war he had turned over to complainants between $4,000 and $5,000 in Confederate notes and securities to balance his ac-

counts as guardian, it appearing from his books that there were that many dollars due by him to the ward. The evidence being that his ward's funds had run into that kind of currency during the war. It appeared from the evidence that he had sold the negroes at private sale, on credit, and the purchaser being unable to pay for them, he had taken them back, and they were lost by emancipation.

The case was submitted to the jury without the accounts ever having been referred to an auditor, and without instructions asked for, or given to the jury, as to what rules they were to be guided by in allowing the disbursements of the guardian, none of the items of which were specifically surcharged and falsified. The Court charged the jury correctly as to the liability of the guardian for mixing the funds of his ward with his own, and the jury returned a verdict for $2,000 for complainants, not indicating by what process they arrived at this result. Complainants moved for a new trial, because the verdict was for too small an amount, on various grounds, among them because the verdict was contrary to the evidence and the principles of justice and equity, and the charge of the Court. There was no allegation that the verdict was contrary to law, though there was much argument by counsel going to show that the verdict was contrary to law, in that "defendant never having made any investments of his ward's money, he is liable for the amounts received by him as guardian, with interest upon the same from the time of its reception, at whatever the money was worth at the time he received it, deducting the legitimate disbursements made by him." And counsel presented a calculation purporting to show how the jury should have arrived at a verdict for a much larger amount. It is only necessary to notice a single error in the calculations of counsel to show that if the jury have made any errors, they might have fallen into graver ones had they adopted those calculations. Counsel for complainants charge the defendant with having received in gold, on July 1st, 1856, the sum of $12,000. The proof shows

that he then received a bond of one Scarlet, on which that amount was running to maturity, and that he afterwards received in payment on said bond $4,200 in Confederate money. This Court has frequently decided that if received when ordinarily prudent men took the money in their business transactions, he could not be held liable for its depreciation or loss.

There was no evidence submitted to the jury as to the value of Confederate money at the various dates of the disbursements by the guardian. In view of the manner in which the whole case was thus left to the jury, without chart or compass to guide them through this labarynth of accounts running through a series of years, with the currency ever fluctuating and varying, this Court will not undertake to say that their finding was contrary to the evidence or the principles of justice and equity, or the charge of the Court. Nor will the Court grant a new trial on the ground that the verdict is contrary to law, no such assignment of error appearing in the record.

2. And, under the facts stated, the jury will be allowed a liberal discretion in adjusting the equities between the parties, as provided for by the Ordinance of 1865; nor will the Court scan too critically the result at which they arrive, no bad faith appearing on the part of the guardian.

3. Counsel for complainants also insisted that the jury should have charged the guardian with compound interest after six years, and annually thereafter. Here the rule of adjustment insisted on by the counsel would again have led the jury into error, as the law authorizing such a charge was suspended during the war by Act of December 6th, 1862, which took precedence of the Code by Act of December 13th, 1862.

4. Counsel for complainants again say, and so charge in their calculation, that the complainants were entitled to $500 in gold for their share of the negroes sold, and interest thereon from January 1st, 1860, and contend that the guardian's return to the Ordinary was conclusive against him as to this

sale of the negroes. We think not. The returns of a guardian, made in good faith, (and there is no evidence of bad faith here) are only *prima facie* evidence against him, and may be explained by parol evidence. In the charge upon this point the Court erred, but in favor of complaints.

5. The remaining errors complained of, conceding them to be such, are immaterial, and could not have influenced the verdict.

Judgment affirmed.

MOSES RICE, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

Where the verdict of the jury is strongly and decidedly against the weight of the evidence, and without sufficient evidence under the law to authorize a conviction for the offense alleged in the indictment, a new trial will be granted.

Criminal law. Simple larceny. Circumstantial evidence. New trial. Before Judge ROBINSON. Jones Superior Court. October Term, 1871.

The plaintiff in error was indicted for simple larceny. Upon the trial the following evidence was introduced:

EVIDENCE FOR THE STATE.

WILLIAM ROBERTS, sworn: Witness lost a horse, on the night of the 2d of August, 1871, in Jones county, Georgia. Horse was taken out of the lot, the gate of which was at night locked. The lock was found broken in the morning. The horse was a large bay horse, with white hind feet, eight years old, worth $300, belonging to witness. Saw tracks; looked like white man's tracks; did not examine the tracks particularly. The person who got the wrench took it out of the wagon. It is about seventy-five yards from the lot

rhence the horse was taken to the wagon shelter. The lot s seventy-five yards from the witness' house. The blacksmith's shop is about sixty or seventy-five yards from the ıouse. Do not know that the horse was in the lot that night. :t was moonlight, and dry. Heard between daybreak and unrise that the horse was gone; the crow-bar had been taken rom where it was; the track was a fresh one. Witness racked the horse from the lot to the main road; thence to the ork of the Macon and Clinton road; tracked him in the voods, and into the Clinton road, for some distance. Asked lefendant to confess to taking the horse; told him to tell rhere the horse was; had defendant arrested about two weeks fter the horse was taken. Defendant lives about four or ive miles from witness. Had ridden the horse that day. 'he crow-bar had been unsuccessfully used to break the ock. The crow-bar was from one and one-fourth to one and ne-half inches square, and four feet long; would weigh bout twenty pounds. The catch inside the lock was broken. 'he crow-bar was flattened at the end, and was about one nd three-fourths inches wide. The staples in the gate ran hrough the posts, and were clinched, so that they could not e drawn.

Isaac Sykes, sworn: Knows defendant, and the time rhen Mr. Roberts' horse was taken. Witness saw the horse ı the lot that night; the gate was locked after the horse was ıut in the lot. Heard defendant say, the day before he was rrested, and after the horse was taken, that if Mr. Roberts rould give him $200, he (defendant) would get the horse. Witness and defendant went to the blacksmith's shop that norning, and defendant ordered witness to unhook the winlows. Witness told him, "Me and Mass Billy had drawn he staples a morning or two before." Defendant told witıess, if Roberts would give him $200, he would get the ıorse, but would not get the man that stole him. Witness aked defendant why he did not get him the first day he ıunted for him. Defendant said that was a new thing, but

the horse was no more than twenty-five or thirty-five miles off. The wagoner, Jackson Ford, came after the wagon at twelve o'clock, to have a wrench made. Soon after that, defendant said he be G—d—d, if the crow-bar broke the stable-lock; said that he could go from the shop right through the lot, and get the wrench that broke the lock. Defendant got over the lot fence, and said: "Here is the d—d thing that broke the lock. Witness and Jackson Ford went with the defendant from the shop to the lot. The wagon shelter is in the yard. Saw a track the morning the horse was taken; it was a neat looking track, common heel. Saw it near the gin-house. Defendant picked up the key in the shop. The key was not there the day before. Searched with Mr. Roberts for the key, outside and inside the shop. Have nothing against defendant; never had a misunderstanding with defendant. Defendant reported witness to Mr. Roberts in May or June; liked defendant as well after as before he reported witness. The key was a common padlock key. It had been missing a week or two. Witness said to defendant: "Let us get the crow-bar, and see how a man could break the lock." Witness got the crow-bar, and tried it. Defendant said the crow-bar did not break the lock. Mr. Roberts sent witness and Mr. Simmons to look for the wrench. Nothing was said about the wrench until defendant came there. After Mr. Roberts' wife came there, defendant said: "Here is the d—d thing that broke the lock," and showed how it was done. The key had been missing from time defendant worked at Mr. Roberts'. The track looked like a shoe track to him.

Owen Bostick, sworn: Remembers when Roberts' horse was taken. Went into the lot to look after tracks; went from the little gate, near the gin-house, up to the wagon shelter, followed the tracks back to the horse lot; the tracks indicated shoes with half plates to the heels; saw half plates on defendant's shoes about two weeks after the horse was taken; the tracks seemed to be made by number eight or nine shoes.

Witness told defendant that Mr. Roberts had offered $200 for his horse; that, as they were working about, they had better look for the horse; defendant seemed willing to go with witness to look for the horse. Heard Mr. Roberts say, in Flanders' store, in Macon, that he would give a reward of $200 for the horse.

AMY SYKES, sworn: Knows defendant and his tracks; went to the wagon shelter the morning after the horse was stolen; saw defendant's tracks; there were plates on the tracks and on defendant's shoes; they were the same identical tracks. Isaac Sykes is witness' son; don't know that Isaac and defendant had a difficulty; Isaac said nothing against defendant. She knew that morning that the tracks were defendant's; did not tell Mr. Roberts, but told Owen and a woman named Anna; the track was a small one, tolerably fine shoe track. The horse's track was very fresh. The moon shone very bright. Thinks the track was made at about ten or eleven o'clock; this is a mere opinion.

The State here closed.

EVIDENCE FOR THE DEFENDANT.

M. P. WILSON, sworn: Knows defendant. On the night of the 2d of August last, defendant was at the house of witness, two or three miles from Mr. Roberts', at supper time and at eleven o'clock. Sent for defendant after supper, and he did not come; sent for him again, and he came about eleven o'clock; defendant was at witness' house the next morning at day break. Does not remember exactly that it was August 2d, but knows that it was the night the horse was stolen; heard the next morning that the horse had been stolen. Do not know where defendant was between eleven o'clock and day break, or from supper time until eleven o'clock.

MARTHA BLAND, sworn: Lives at Mr. Wilson's. Knows defendant. At "good" after supper time, defendant was at the kitchen window; it was about eight or nine o'clock; he re-

mained there till she went off; she left him in the yard at about ten o'clock. Eat supper about dusk. Defendant was at the window, when Mr. Wilson told witness, about supper time, to tell defendant to go to him; she went back and told Mr. Wilson that defendant had gone off; he had not gone off, but was at the kitchen window; it was not long before she left; had a reason for telling Mr. Wilson that defendant was not there.

JULIA TURNER, sworn: Lives at Mr. Wilson's. Knows defendant. They sent for defendant after supper; when she saw him, she sent him to the house. He stayed in her house that night; he was in her house when she laid down, and once during the night, when she got up, he was there; he was there the next morning, and went out of her house into the yard to go to Macon with Mr. Wilson. Never told Mrs. Wilson's sister that witness believed that defendant stole the horse. Witness' children were sick, and she was up with them; she got up just one time during the night.

JOSEPH WILSON, sworn: Knows defendant. Do not know where he was all night. He was there at supper time and at day break the next morning. Defendant went with witness to Macon that day. It was about dark when witness saw him; heard him talking to witness' father at about 11 o'clock.

Defendant closed.

The jury found the defendant guilty. A motion was made for a new trial upon several grounds, only two of which it is here necessary to mention, to-wit:

1st. Because the jury found contrary to the evidence.

2d. Because the evidence in the case being entirely circumstantial, it was not of such a character as to fasten guilt upon the defendant beyond a reasonable doubt, and that such evidence did not exclude every other reasonable hypothesis, except that of the guilt of the accused.

The Court overruled the motion for a new trial and defendant excepted.

SAMUEL D. IRVIN, by brief, for plaintiff in error.

FLEMMING JORDAN, Solicitor General, represented by J. H. BLOUNT, for the State.

WARNER, Chief Justice.

The defendant was indicted in the Court below for the offense of simple larceny, and on the trial, the jury returned a verdict of guilty. A motion was made for a new trial, which was overruled by the Court, and the defendant excepted. In our judgment, the verdict of the jury was strongly and decidedly against the weight of the evidence, and without sufficient evidence, under the law, to authorize a conviction for the offense alleged in the indictment. The circumstantial evidence was not sufficient to establish the hypothesis of the defendant's guilt, as claimed by the State.

Let the judgment of the Court below be reversed.

MACON AND AUGUSTA RAILROAD COMPANY *et al.*, plaintiffs in error, *vs.* THOMAS O. BOWEN, defendant in error.

Where several owners of land lying on the line of a projected railroad make a written agreement, that if the road is located as projected, they will grant to the company the right of way over their land, and the road is accordingly so located and built, the owners of the land are estopped from claiming damages, for the running of the road through their land, and on trial, under charter for ascertaining the value of the fee simple right to the land used, that value is to be counted on, so far as it had value over and above the right of way.

The grant of the right of way over land in consideration of the location of a railroad as projected, is not revocable after acted on. (R.)

Appeal from award. Assessment of damages under railroad charter. Right of way. Before Judge ROBINSON. Jones Superior Court. October Term, 1871.

An award was rendered by arbitrators to assess damages in favor of defendant in error against plaintiff in error, for running a railroad through the land of the former. An appeal was entered by plaintiff in error to the Superior Court. The case was submitted to a jury, who found a verdict in favor of defendant in error, for the sum of $1,300.50. As a portion of the evidence, the plaintiff in error introduced a written agreement, made on November 28th, 1860, by which defendant in error and others contracted, in consideration of the benefits which they expected to derive from the railroad through their property, to grant to said road the right of way through their land, the same not to exceed seventy-five feet in width on each side of the centre line of said road. Plaintiffs in error requested the Court to charge as follows: "If the jury shall believe, from the evidence, that the plaintiff executed to defendant the instrument put in evidence, he is not entitled to recover anything beyond the difference in value between the right of way thereby granted, and the fee of the land actually taken." The Court refused to give said request in charge, and plaintiff in error excepted.

The facts given above are sufficient for a full understanding of the decision of the Court.

WHITTLE and GUSTIN; ISAAC HARDEMAN, for plaintiffs in error, cited 13 Ga. R., 68; Code, sections 3003, 2808; Redfield on Railways, 270; 7 Watts and Serg., 236; 29 Ga. R., 100; 39 *Ib.*, 597. Grant of right of way, effect of: 30 Ga. R., 55; Code, sections 1940, 2673, 3131, 3133.

J. H. BLOUNT; WILLIAM MCKINLEY, for defendant. Measure of damages: 30 Ga. R., 43; 17 *Ib.*, 30.

McCAY, Judge.

We are clear that this written agreement is not to be disposed of by the simple statement of the plaintiff that he had revoked it. Such a paper does not stand upon the footing

f a license. It is based upon a consideration, and when ted upon by the railroad is an executed agreement. Perps, if repudiated before the road was located, the repudiaon might have been good; but after it has been *acted upon*, ie road located upon the faith of it, it seems to us it would e a clear fraud to permit its repudiation. Doubtless, the laintiff had a strong motive for signing such a paper. We ll know how anxious men are to get railroads built through eir neighborhoods, and how ready and anxious they are to old out inducements to encourage their construction. So r as appears from the record, the railroad company, by cating the road as stipulated, has paid to the plaintiff the ll contract value of the right of way over this land with s usual incidents. By the charter of the road the assessent by the commissioners is to be of the full value of the le to the land. This the plaintiff, the owner, has a right recover, less the right of way. The measure of damages the value of the land, less the right of way. Or the value the land, so far as it has value, burdened as it is by the ght of way, which already belongs to the railroad.

Judgment reversed.

SHAM S. FANNIN, administrator, plaintiff in error, *vs.* P. R. THOMASSON, defendant in error.

Though a defendant in an action at law may, in Georgia, set up an equitable defense by his plea, yet he is not obliged to do so, and if he omit it where such defense constitutes an independent claim against the plaintiff, he is not thereby estopped after judgment against him in the common law action, from filing his bill to enjoin the judgment and to set up his equitable defense against it.

. The second section of the Relief Act of 1868 allows the defendant to avail himself of such equitable defense by motion, in place of filing a bill in the class of cases therein mentioned.

. But where, in an issue formed upon an affidavit of illegality, under that Act, the defendant in *fi. fa.* proves that plaintiff promised to take

seven-thirty Confederate notes or Georgia State bonds issued during the war, in payment, and that he, induced by the promise, bought such notes and bonds "with what money he had, (meaning Confederate money,) and sold some cotton," (it not appearing how much cotton o to what extent defendant was damaged) to raise the balance, and then tendered the bonds and notes to the plaintiff, which he refused, in consequence of which defendant held them, and they became worthless in his hands, and the jury found for the defendant, a new trial should have been granted. No damage is sufficiently proved to constitute a good equitable defense to the execution. WARNER, C. J., concurring.

New Trial. Relief Act of 1868. Equitable defense. Before Judge ROBINSON. Morgan Superior Court. September Adjourned Term, 1871.

Plaintiff in error was proceeding to make his money upon an execution in his favor against defendant in error, issued upon a judgment obtained at March Term, 1867, of Morgan Superior Court, for the sum of $3,119.81, principal, and $1,103.07, interest, when he was stopped by an affidavit stating that defendant in error was desirous of availing himself of the benefits of the Relief Act of 1868. At the November Term, 1869, the defendant in error moved to have said judgment opened upon the following ground, to-wit:

Because said judgment is founded upon a promissory note for the sum of $3,119.81; that the consideration of said note was money loaned by Lancelot Johnson as agent for Miss Mary Johnson; that at the time said credit was given, said defendant was possessed of property of all kinds of the value of $37,500, upon the faith of which said credit was given; that said property upon the faith of which said credit was given included slave property to the value of $17,500; that at the date of said credit, the government protected alike said payee and this defendant in their property; that after said credit was given, the government destroyed his property in slaves, and thereby relieved said defendant *pro tanto* from his obligation upon said contract; that after making said note, in the month of May or June, 1861, he went to Lance-

ot Johnson, who had control of said note, and offered to pay ff the same in bank bills, which said Johnson refused to ake; that defendant afterwards offered to pay the same in onfederate money, which was also refused; that sometime n the year 1863 said defendant asked said Johnson if he ould take interest-bearing Confederate notes and State onds, which he agreed to do; that upon the faith of this greement, said defendant sent to Augusta and bought inter-st-bearing Confederate notes and State bonds, to an amount fficient to pay off said note, and tendered the same to the ayee of said note through her agent as aforesaid; that Mr. ancelot Johnson replied that he had changed his mind, and ould not take them at all; that said notes and bonds have een lost entirely to this defendant by reason of said payee's efusal to take the same, after inducing this defendant to pro-ure them; that after the surrender of the Confederate army, nd after said note came into the hands of plaintiff in error, aid defendant offered to convey to said plaintiff in error and o Antoine Poulain, executor of Lancelot Johnson, in pay-nent of what he owed them, his store house and lot in the ity of Madison, which, at a low valuation, was more than ufficient to pay off what he owed to both these estates, which roposition was also rejected; that afterwards said defendant ffered to said last mentioned parties, in payment of what he wed both estates, his plantation on Apalachee river, which as also refused; that said defendant has endeavored most arnestly at divers times to have said debt adjusted upon fair nd equitable principles; that he has always been ready and illing, and is still ready and willing to adjust the same pon correct principles.

Upon the trial, defendant in error proved substantially the acts set forth in the above motion, with the additional fact hat "he went to Augusta and sold some cotton which he had there, with which, together with what money he had, he purchased the notes and State bonds." The jury returned a verdict in favor of defendant in error. A motion for a new

trial was made and overruled, and plaintiff in error excepted upon the following grounds, to-wit:

1st. Because the Court erred in refusing to grant a new trial in said case, on the ground that the verdict was contrary to evidence and the principles of justice and equity.

2d. Because the Court erred in refusing a new trial on the ground that the verdict was against evidence and without evidence to support it.

3d. Because the Court erred in refusing a new trial on the ground that the verdict was strongly and decidedly against the weight of evidence.

4th. Because the Court erred in refusing a new trial on the ground that error was committed in allowing defendant in error to testify for himself, Mary Johnston, the original payee of the note upon which the judgment was founded, and Lancelot Johnston, her alleged agent, both being dead.

5th. Because the Court erred in refusing a new trial on the ground that error was committed in not dismissing the motion to open judgment, for the reason that movant did not show by said motion any ground of defense other than such as he could have availed himself of on the trial at which the original judgment was rendered.

A. G. & F. C. FOSTER; J. A. BILLUPS, for plaintiff in error.

REESE & REESE, for defendant, cited 5th section of Relief Act of 1868. Tender may be set up, though not in conformity with strict law: 40 Ga. R., 493; *Ibid.*, 501. Suitor compelled to appear on equity side of Court, but optional if he has remedy at law: Code, sections 3027, 3040.

MONTGOMERY, Judge.

1. This was an attempt by defendant in error, who was also defendant in *fi. fa.* below, to avail himself of an equitable defense to the execution by motion under the Relief Act

of 1868. The defense was, that he had been induced by plaintiff's intestate, before the judgment was obtained, and during the war, to purchase Confederate seven-thirty notes and Georgia war bonds, under a promise that said intestate would take them in payment of the debt; that he, in consequence of the promise, bought the notes and bonds "with what money he had," (Confederate money) and that he "sold some cotton" to raise the balance necessary to make the purchase. That he then tendered the notes and bonds to the intestate, which he refused to receive, and in consequence of such refusal the defendant was compelled to hold them until the close of the war, when they perished on his hands. How much cotton was sold does not appear. Nor is it stated what damage, if any, was suffered by the defendant in consequence of the purchase, the refusal to receive the bonds and notes in payment, and the fact that they perished on his hands. The defense, had damage been proved, was an equitable one, of which the defendant might have availed himself by plea before judgment, under our system of pleading, but he was not obliged to do so. Inasmuch as the defense constituted an independent claim against the plaintiff, in the nature of a set-off, his failure to plead it at law does not estop him from setting it up by bill to enjoin the common law judgment: White and Tudor's Equity Cases, volume 2, part 2, page 466; Pollock *vs.* Gilbert, 16 Georgia, 398; Mordecai *vs.* Stewart, 37 Georgia, 364. Chief Justice Warner's dissenting opinion.

2. His right to set it up by bill being undoubted, he may do so by affidavit of illegality, and motion under the second section of the Relief Act of 1868, in the class of cases mentioned in the Act: White *vs.* Herndon, 40 Georgia, 493, 501; 2 Georgia, 295.

2. But inasmuch as he failed to show any damage resulting from his purchase of the bonds and notes, he was not entitled to a verdict, and a new trial should have been awarded.

Let the judgment of the Court below be reversed.

WARNER, Chief Justice, concurring.

I concur in the judgment of the reversal in this case, on the ground that the defendant was concluded, by the judgment rendered against him in March, 1867, from setting up the defense relied on. The second section of the Act of 1868, so far as it creates a *new equity* and *new grounds of defense* to the contract, and judgment rendered thereon, which did not exist by law at the time the contract was made, and at the time the judgment was rendered thereon, is unconstitutional and void.

EARLY W. THRASHER, executor, plaintiff in error, *vs.* JAMES C. ANDERSON, *et al.*, defendants in error.

Where, upon the calling of a cause, a motion was made by the defendant to continue the same on the ground of the absence from providential cause of one of his counsel, who was also his son, and the defendant made affidavit that the absent counsel was the leading counsel, who had been entrusted with the entire charge of preparing and arranging the evidence, and with whom he had more free and full conferences than with any other counsel; that he could not safely go to trial without his presence; that the application was not made for delay; and the Court refused the continuance, and after a verdict for the plaintiff, it appeared on a motion for new trial, that the defendant was seriously damaged by the absence of said counsel in this, that the counsel was in possession of a paper that would have been material evidence on the trial, by reason of the answers to a certain set of interrogatories now opened upon the trial:

Held, That, in furtherance of the principles of justice and equity, a new trial ought to have been granted.

Where, on a bill filed by legatees under a will against the executor for an account, the only issue submitted to a jury was, whether a receipt held by the executor, signed by the testator, was a good discharge of certain notes held by the testator against the executor, and the bill charged that the receipt was obtained by undue influence, and whilst the testator was not of sound mind, and the answer set forth the receipt in full and relied on it, and the original was, under order of the Judge, deposited for inspection, and it plainly appeared on its face that

ain words and figures therein had been altered, but there was noth-
o show that the alterations were made subsequently to its signing:
That, as the plaintiff allowed the receipt to go in evidence without
objection to it, on the ground of its alteration, and there was noth-
n the evidence to show that the alterations were not made pre-
sly to the signing of the same by the testator, the presumption of
is that the alterations were made previously, and it was not com-
nt for the jury to find against the validity of the receipt on the
nd of the apparent alterations.

uity. Continuance. Alteration. New Trial. Before
ɜ ROBINSON. Morgan Superior Court. September
ırned Term, 1871.

nes C. Anderson and others filed their bill against Early
hrasher, as executor upon the estate of Barton Thrasher,
ɜed. The complainants charged that they were legatees
the will of said Barton Thrasher, executed on the 14th
f October, 1865; that in the second item of said will
nd the following language in reference to said executor:
so hold against him (meaning Early W. Thrasher,) a
issory note for $25,300, dated September 15th, 1864,
the renewal of a note I held against him before the
ınd which so far as not paid during my life, he must
ıto my estate after my death, so as to be counted in the
livision of my estate hereinafter provided for; and any
I may hold at my death against any of my legatees,
ıg date at any time after the date of this will, or any
t from any of them, for any advancement out of my
, bearing date as last aforesaid, is to be counted against
egatee in such final division;" that said Early W. was
ın of the testator and one of the legatees under his will;
he testator, at the date of his death, was possessed of
promissory notes on said Early W. amounting in the
gate to the sum of $36,691.74, which notes were never
ced to the appraisers by the said executor, and which
have thus far been wholly unaccounted for; that said
W., in the partial division already made, has reserved
ıself an equal share with the other legatees without ac-

counting in any manner for the amount due the estate on said notes. Various other charges of misappropriation and irregularities were made, which it is unnecessary here to set forth. The complainants prayed an account, payment of the several legacies and a full settlement of the estate. Early W. Thrasher, in his answer, admitted the charge as to the notes on him held by the testator, but set up in defense a receipt alleged to have been given after the execution of the will, but to date back to that time, in which the testator acknowledged to have received from said Early W. the sum of $27,500, to be credited on the notes held by him. It was agreed between counsel for the respective parties that the jury should pass only on the issues of fact; that the calculations should be made by John G. McHenry, Esq., as auditor; that after the issues of fact were decided and the calculations made, a decretal verdict should be signed by the jury. All the charges in the bill, except those relating to the notes and receipt were withdrawn. When the case was called for trial, plaintiff in error submitted a motion for a continuance upon the ground of the absence of B. H. Thrasher, Esq., and made affidavit as follows: "B. H. Thrasher is leading counsel in this case. I have had more frequent and fuller conversations with him than with Colonel Billups or other counsel. He has entire charge of getting up, preparing and arranging the evidence in the case. I cannot go safely to trial without his services. I expect his services at the next term. He is not absent by my consent or procurement. This application is not made for delay only."

As a portion of the showing, plaintiff in error submitted the certificate of Edwin S. Ray, M. D., that the condition of the health of B. H. Thrasher's wife was such as to require his constant presence and attention at home. Also, a letter to Judge Robinson, from B. H. Thrasher, Esq., stating that it was out of his power to attend that term of the Court; that Fulton Superior Court was in session; that Judge Hopkins had excused his attendance on account of the condition

of his family; that, for these reasons, he desired leave of absence. The motion for a continuance was overruled.

After the evidence for complainants was closed, defendant introduced in evidence the following receipt, which had some marks of alteration upon its face:

"$27,500.00. Received of Early W. Trasher, twenty-seven thousand five hundred dollars, to be credited on three notes I hold on him, to be credited on the 14th of October, 1865. This April 8th, 1867.

(Signed) "BARTON THRASHER."

No objection was made to this receipt, for any cause, upon its introduction. The receipt had been deposited in the Clerk's office, under order of Court, for inspection. Subsequent to its introduction, the receipt was attacked upon the ground of its apparent alteration, and by evidence of incapacity to attend to business, on the part of testator, on the day of its purported date. The jury returned the following verdict: "We, the jury, find for complainants, so far as the receipt is concerned." A formal decretal verdict was then prepared and signed.

Plaintiff in error moved for a new trial, upon several grounds, only two of which it is here necessary to mention: 1st. Because the Court erred in overruling the motion for continuance made by defendant, on account of the absence of B. H. Thrasher, Esq., leading counsel. 2d. Because the verdict of the jury is contrary to and against the charge of the Court, contained in the following words: "An alteration of a written instrument, if nothing appears to the contrary, should be presumed to have been made at the time of its execution."

With the motion for a new trial, was submitted the affidavit of B. H. Thrasher, Esq., to the effect that certain facts were known to him alone, as leading counsel in the above stated case; that he was in possession, at the time of the trial, of the written admission of one of the witnesses for complain-

ant, to facts most important to the defense; that the evidence of this witness for complainants, by interrogatories and answers, was then in Court; that, induced by this writing, and by other verbal statements made by said witness to him, and by the desire to contradict his testimony for complainants, he sued out a commission, with interrogatories attached, for said witness, and had the same executed; that the answers to these interrogatories were not read upon the trial; that, had he been present, he would have read said answers, and then have introduced evidence which was in his possession and personal knowledge, and which he had not communicated to his associate counsel, to impeach the testimony of the said witness; that he would have been entitled, under the law, to pursue this course, notwithstanding the fact that said witness had been introduced for defendant, by showing that he had been entrapped by the written and verbal statements already alluded to. The motion for a new trial was overruled and plaintiff in error excepted.

The Judge, in his certificate to the bill of exceptions, stated the case had been continued three times in consequence of the absence of counsel for the defendant, which fact had its influence with the Court in overruling the motion for a continuance.

THRASHER & THRASHER; BILLUPS & BROBSTON; CLARK & GOSS, for plaintiff in error, cited Daniel's Ch. Pr., 376, 992; 24 Ga. R., 217; Code, sec 4134; 17 Rule of Eq. Pr.; Code, sec. 3474; 36 Ga. R., 54; Code, secs. 2808, 2811, 3754, 2821, 2618; Story's Eq. Ju., 705–6; 38 Ga. R., 560; 30 *Ibid.*, 690; 1 P. Wms., 462; Rosser on Legacies, 340; Code, sec. 2538; 16 Ga. R., 16; 24 *Ibid.*, 505; Ward on Legacies, 261; Rosser on Legacies, 227; 38 Ga. R., 320; 17 *Ibid.*, 558.

REESE & REESE, for defendants, cited 40 Ga. R., 529; 10 *Ibid.*, 85; 18 *Ibid.*, 383; 24 *Ibid.*, 473; 30 *Ibid.*, 237; Code, sec. 4132, 4141; 17 Ga. R., 558; 1 Greenleaf, sec. 564 and 165; 16 Ga. R., 16.

McCAY, Judge.

We think, after a careful examination of the record in this case, that the principles of justice require another trial. The verdict cannot, in our judgment, be legally sustained, except on the evidence of imposition by the defendant in procuring the receipt from the testator, when he was incompetent to contract. We do not say this is the truth, but that it must have been only on that point that the jury acted. There is some evidence to sustain the verdict on that issue, and we should hesitate to disturb it, under the rule we have so often announced, had that branch of the case been fairly before the jury. Very much of the strength of the plaintiff's case turned on the evidence of W. H. Thrasher. Had Mr. B. H. Thrasher been present, the papers in his possession and his knowledge of this witness' conduct in relation to his testimony would have enabled the defendant seriously to weaken the effect of this testimony before the jury.

It is made very apparent by the affidavits in the motion for new trial that the absence of Mr. B. H. Thrasher was providential, and though it may be that the Court did not err in refusing the continuance, with the evidence before him at the time, yet it is now very clear that the defendant was seriously damaged by his absence, and that he was kept away by causes which justified his remaining at home. Under sections 3662 and 3667 of the Code a new trial ought to be granted when the principles of justice require it. As we view the case, the defendant, without any fault of his own, has been deprived of material testimony upon the principal point on which his case must, under the law, have turned, as well as lost the aid before the jury of the principal counsel on which he relied. Nor is the counsel to blame for his absence. For this reason we think a new trial ought to be granted.

We say nothing about the effect of the alteration of the receipt on the minds of the jury. We will not presume that

they failed to heed the charge of the Judge. It has been assumed, on both sides in the argument, that the verdict turned largely on the evidence before the jury of the alteration in the receipt, and were the verdict not sustainable on the ground we have mentioned, we should be very slow to let it stand on the proof, as to the alteration. The rule is well settled in this State that alterations are, *prima facie*, presumed to have been made before execution, unless the paper be denied on oath: 17 Ga., 558; 31 Ga., 371; 36 Ga., 482.

If the alteration be subsequent to the execution, and be to a material point, and be intentional by one claiming a benefit under it, with intent to defraud the other party, it is void: Code, 2801. There are some other provisions of the Code, (sections 2803, 3782,) from which it may be argued that, in all cases, the burden of explanation is upon the party producing the paper. But these clauses are to be understood of alterations, apparent upon the paper, to have been made after the execution. They are not, in fact, alterations, if made before. If made after, as sometimes is apparent from inspection, the party producing the paper must show that the alteration was not intentional, or bring it within some of the exceptions provided in section 2801 of the Code. The case in 17 Georgia, 558, is perfectly consistent with these sections, and lays down the rule as we have stated. If this rule means anything, it is that, unless it appear affirmatively that an apparent alteration was made after execution, it is not to be considered. It is absurd to say that, *prima facie*, the presumption is one way, but the jury may, at their pleasure, treat this presumption as of no weight. As we understand the rule, there must be something to rebut the presumption—something on the face of the paper or in the *aliunde* proof, going to show that the alteration was made subsequent to the execution.

We see nothing in the evidence going to show this. The paper has, without doubt, been altered, perhaps in several important particulars. But who can say, from the evidence,

t was done after it was signed? What evidence there all in favor of the paper being just as it was when l. Every mark upon it, showing change, may just as ıave been made, with the free consent of the maker, at me of the signature as afterwards. Nothing is more on in this State than alterations and interlineations in and other papers. Since the decision of the case in 17 ia, 558, even lawyers often allow papers, prepared by elves, to be altered before signature. And why not? urden of showing that the alteration was made after ion is upon the objector, and no harm comes of it. her the rule is a wise one, is not the question. It is h that the rule exists, and is to be heeded not only by s, but by juries also.

was not competent for the jury to find this verdict on ound that this paper showed upon its face that certain in it had been changed from one thing to another, un- ıe evidence also showed that the change was made after per was signed. That was the legal effect of the ruling Court, and, as we have said, it was not competent for ıry to disregard it. The paper goes before them with sumption that the alteration was before the signing. presumption is good until it is rebutted.

put our reversal on the first ground, because we have ght to presume that the jury disregarded the charge of ourt. They may have found on the ground of imposi- ıpon a man too weak to know his own mind, and as that h of the case was not fairly before the jury, we think efendant below ought to have a rehearing.

lgment reversed.

LILLIE HORNE, plaintiff in error, *vs.* JOHN WOOLFOLK and THOMAS J. WOOLFOLK, executors, defendants in error.

When Woolfolk executed a lease to Horne of a part of a city lot for the term of ten years, and subsequently Woolfolk, being the owner in fee of the whole lot, executed another lease of the whole lot to Mason & Dibble for the term of ten years, subject to the lien and incumbrance of the prior lease made to Horne:

Held, That the execution of the second lease of the whole lot to Mason & Dibble, subject to the lien and incumbrance of the prior lease made to Horne for a part of the lot, without more, did not make Woolfolk an executor *de son tort*, and liable to the heir-at-law of Horne, although the second lease was executed to Mason & Dibble after the death of Horne.

New Trial. Lease. Executor *de son tort*. Before Judge ROBINSON. Jones Superior Court. October Term, 1871.

For the facts of this case, see the opinion.

J. RUTHERFORD; J. H. BLOUNT, for plaintiff in error.

WHITTLE & GUSTIN; LANIER & ANDERSON, for defendants. 1st. Verdict void for uncertainty: Code, sec. 3501; 8 Ga. R., 201; 17 *Ibid.*, 361. 2d. New trial granted; only in case of abuse of discretion will the judgment be reversed: 42 Ga. R., 64; 40 *Ibid.*, 91; 36 *Ibid.*, 321, 604. 3d. Possession taken by person claiming lien, not liable: 1 Williams on Ex'rs, 229; 1 Devereux, 25; 5 Ala., 31. 4th. Executor *de son tort*, what constitutes: 1 Williams on Ex'rs, 225, 232; 4 Bacon's Abridgment, 27, 32; 2 Blackstone's Com's, 507; 4 McCord, 286; 38 Ga. R., 264. 5th. Before the adoption of the Code an executor *de son tort* was not liable to distributees: 4 Bacon's Abridgment, 32, note(c); 2 Murphey, 335; 5 Monroe, 521; 3 P. Wm's, 348.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants as executors of their deceased testator, alleging

their testator, in his lifetime, became liable to the plain-
s an executor *de son tort* of the estate of F. Horne. The
tiff sues as the heir and distributee of F. Horne. On
rial of the case the jury found a verdict in favor of the
tiff for the sum of $4,669.50. A motion was made for
v trial on several grounds, which was granted by the
t on the ground that the Court erred in its charge to the

Whereupon, the plaintiff excepted.

appears from the evidence in the record that Thomas
lfolk, the defendant's testator, on the 12th of July, 1844,
ited a lease to F. Horne of a part of a city lot in the city
acon for the term of ten years, for the sum of $1,000—
ayments to be made in ten annual installments of $100
—the buildings put on the lot by Horne to be removed
m after payment of all the rent due at the expiration of
ease. Horne put a building on that part of the lot leased
im and occupied the same until his death, leaving six
s and eight months of the lease unexpired at the time of
eath, but had not paid the rent for the time he occupied
remises. After the death of Horne, to-wit: on the 12th
ugust, 1848, Thomas Woolfolk, the defendant's testator,
was the owner in fee of the whole lot, executed a lease
e same to Mason & Dibble for the term of ten years, for
nnual rent of $120, to be paid quarterly, subject to the
nbrance of the lease made to Horne, which was specially
red to in the last named lease, and covenanted "that said
n & Dibble should lawfully and peaceably enjoy the
, subject to the said lien and incumbrance of said lease
e said Ferdinand Horne hereinbefore mentioned."

is claimed that because Mason & Dibble took possession
at part of the lot leased to Horne, and occupied the
under the lease of Woolfolk to them, that therefore
lfolk was liable to the plaintiff as an executor *de son tort.*
is not our understanding of the law. Whether Mason
ibble would have been liable to the plaintiff as executors
n tort was not the question before the Court; but the

question before the Court was whether the execution of the lease to them of the whole lot, subject to the incumbrance of Horne's lease on a part of it, by Woolfolk, made him an executor *de son tort* under the law. What acts will constitute an executor *de son tort?* If one man takes the goods of the deceased and sells, or gives them to another, this shall charge him as an executor in his own wrong, but not the one to whom the goods are sold or given. So if a man has some color to intermeddle with the goods of an intestate, but exceeds his authority, that makes him executor *de son tort.* Wiley *vs.* Truett, 12th Georgia Reports, 589. Woolfolk did not sell, or give Horne's lease of part of the lot to Mason & Dibble by his lease to them of the whole lot, but leased it to them subject to Horne's lease thereon; neither did he exceed his authority in leasing the whole lot to them, subject to the incumbrance of the lease which he had previously made to Horne for part of the lot. In executing the lease of the whole lot to Mason & Dibble, Woolfolk did not pretend or attempt to lease or interfere with that part of the lot previously leased by him to Horne. Mason & Dibble acquired no right to the possession of that part of the lot covered by Horne's lease, under the lease made by Woolfolk to them, and the execution of that lease, without more, did not constitute him an executor *de son tort* as to the part of the lot covered by Horne's lease, and the Court should have so instructed the jury. In our judgment, this case was not fairly submitted to the jury, there was manifest error in the charge of the Court, which was properly corrected in granting a new trial.

Let the judgment of the Court below be affirmed.

GRIFFIN & CLAY, plaintiffs in error, *vs.* WILLIAM J. MARSHALL and JOHN W. ANDERSON'S SONS & COMPANY, defendants in error.

Under the Judiciary Act of 1799 and the Act of 1839 amendatory thereto, a mortgage on personal property executed by one non-resident of the State at the time, may, if the property be brought into this State, be foreclosed in the county where the property may be found, and section 3895 of the Code providing for the cases therein mentioned does not repeal the Acts of 1799 and 1839 in this respect.

Foreclosure of mortgage on personalty made by a non-resident. Before Judge SCHLEY. Chatham Superior Court. May Term, 1871.

On April 9th, 1870, William J. Marshall executed a mortgage in favor of Griffin and Clay, in the county of Marion, and State of Florida, "on the entire crop planted and to be grown this year on the plantation in the county and State aforesaid, known as the Wetumpka Place," for the securing of certain promissory notes therein mentioned. Nine bales of cotton covered by this mortgage were brought into the State of Georgia, the mortgagor still retaining his residence in the State of Florida. On February 7th, 1871, the aforesaid mortgage was foreclosed before Judge Schley, and an execution issued, which was levied upon said cotton, and a claim filed by John W. Anderson's Sons and Company. The mortgage was recorded in Chatham county, on February, 3d, 1871. On the trial of the claim, the mortgage execution was excluded upon objections made by the claimant, and plaintiffs in error excepted upon the following grounds, to-wit:

1st. That the Court erred in deciding that a mortgage made in Florida, where the mortgagor resided, at the time, on personal property then in Florida, which property was subsequently removed to the city of Savannah, Chatham county, in Georgia, by the mortgagor, and the mortgage recorded in Chatham county, Georgia, within the time required

by law, he, the mortgagor, still remaining a resident in Florida, and not removing himself into Georgia, cannot be foreclosed in Georgia under the statutory remedy for foreclosure of mortgages on personal property in Georgia.

2d. That the Court erred in deciding that there was no statutory remedy by foreclosure of mortgages of personal property made out of the State, and the property subsequently brought into Georgia, unless the mortgagor resided in the judicial circuit whose Judge foreclosed the mortgage; or where the mortgagor resided in this State at the date of the mortgage, but is a non-resident when the mortgagee seeks his remedy by foreclosure.

3d. That the Court erred in deciding that the judgment of foreclosure in this case was void.

4th. That the Court erred in its entire decision in this case, and that the same is against law, and destroys the lien of the mortgagee by denying and withholding the only and appropriate remedy provided by the laws of Georgia for its enforcement.

LAW, LOVELL & FALLIGANT; J. R. SAUSSY, for plaintiffs in error.

HARTRIDGE & CHISHOLM, for defendants.

McCAY, Judge.

The only question in this case is whether, under our law, a mortgage upon personal property can be foreclosed, in the ordinary method, when, though the property is here, the mortgagor does not reside here. There seems to be no reason why this should not be so, in the nature of things. The proceeding is against the property, and there is no notice to the mortgagor required. The seizure of the property is notice; and even after the seizure the mortgagor, or his agent, Code, section 3899, may set up any defense there may be to the debt. The only difficulty, therefore, is whether our Acts

providing the method of foreclosure include a case where the mortgagor resides out of the State, and the property is within our bounds?

It is contended that section 3895 of the Code covers the whole subject, and that it does not include this case; that the machinery it provides does not apply to the facts of this case. That section declares that the *fiat* shall be issued by the Judge whose Circuit embraces the residence of the mortgager, at the time of the foreclosure, if he be resident in the State, and if not a resident of the State, then by the Judge of the Circuit in which he resided, at the date of the mortgage. The mortgager in this case does not reside here now, and did not at the date of the making of the mortgage. So that by the letter of the statute, there is no express authority given to any Judge to issue the *fiat*, or pass the order. The cases provided for are where the parties have, by their own act, fixed a locality, where there is special propriety, the case shall be returnable, to wit: the residence of the defendant at the time of foreclosure, or, if he has none such, then his residence when he made the mortgage. There is nothing in this Act denying the right to foreclose, when the defendant has not resided here at all; nor is there any provision made for the case, which is not uncommon, when the party making the mortgage is ambulatory, even though he lives in the State. Is the mortgagee to lose his statutory remedy because he cannot follow the letter of the law, or is it the duty of the Courts to give the statute such a construction as will carry out the letter of the law?

The only object of fixing any place for the issuing of the execution is to provide where the issue shall be tried, if the mortgagor makes any defense. For persons who are or have been citizens of Georgia, a place is fixed; but for others, no place is fixed. Why do they not stand on the footing of non-residents, in ordinary suits? Why may they not be sued where they can be found? So far as this is a proceeding against property, the place where it is found would give

a Court of equity jurisdiction over it; and if the defendant wishes to make an issue, he has no residence here, and never has had to give it special direction. Pursuing, therefore, the spirit of section 3895, as well as the spirit of section 3399, as to suits against non-residents, and of section 1690, as to citizens of the State, who have no special residence. We see no reason why the present proceeding is not sustainable. The mortgagee has a clear right to have his mortgage foreclosed in this State.

Our law provides that for every right there shall be a remedy, and if none is pointed out by law the Courts shall frame one: section 3185. It is declared, also, that no person shall be forced into equity, if he chooses to seek his rights at law: Code, 3027. Though in truth, even a Court of equity would have, in this case, to take a jurisdiction as to place, not specially pointed out. Upon the whole, therefore, we think this proceeding was not improper. The law specially authorizes a mortgage in a case like this to be recorded in the county where the property is brought, and it is in full accordance with the spirit of the section for foreclosing. We, therefore, reverse the judgment in this case.

WILLIS YOUNG, Sr., plaintiff in error, *vs.* N. B. BROWN & COMPANY, defendants in error.

WILLIS YOUNG, Sr., plaintiff in error, *vs.* N. B. BROWN, defendant in error.

When Young applied for a homestead, as the head of a family, and, on an appeal from the Court of Ordinary to the Superior Court, a verdict was found against him, on the ground that he was not the head of a family. Afterwards, he made a second application for homestead, on the same land, as the head of a family, which was allowed by the Ordinary, and an appeal was taken to the Superior Court. When the case was called in the Superior Court, a motion was made to dismiss the application, on the ground that the applicant's right to a homestead

had been adjudicated. The applicant made a motion to amend his petition for homestead by inserting a new right of homestead which had accrued since the former verdict and judgment, but which was not included in his petition to the Ordinary. The Court refused to allow the amendment, and dismissed the application:

Held, That the Court erred in refusing to allow the amendment and dismissing the petitioner's application without a hearing of the same, under the evidence in the case.

Homestead. Appeal. Amendment of petition for homestead. Writ of possession. Former judgment. Tried before Judge SCHLEY. Screven Superior Court. May Term, 1871.

These two cases were argued together. The first was a caveat to a homestead applied for by plaintiff in error. The second was a motion made by defendant in error for a writ of possession to the land in which the homestead was applied for, claimed under a purchase made by said defendant at a sheriff's sale, pending the second application. This sale was made subject to the right to the homestead. The second case was "reversed upon the ground that the Court below erred in granting the order to turn said Young out of possession of the land until the question of homestead had been finally determined."

For the facts of these cases, see the decision of the Court.

JOHN D. ASHTON; J. C. DELL; J. L. SINGLETON, represented by R. H. CLARKE and JULIAN HARTRIDGE, for plaintiff in error.

W. HOBBY; J. R. SAUSSY, for defendants. Plaintiff in error is estopped from claiming homestead: 41 Ga. R., 95. The 7th section of the Act of October 28th, 1870, has been declared unconstitutional: 42 Ga. R., 405; 41 *Ibid.*, 620; 18 *Ibid.*, 471. The second application had no place in Court, and was, therefore, not amendable: 13 Ga. R., 217; 41 *Ibid.*, 128.

WARNER, Chief Justice.

This case came before the Court below on appeal from the Court of Ordinary of Screven county. It appears from the record that Willis Young, Sr., as the head of a family, applied for a homestead, which was objected to by Brown & Company, his mortgage creditors, but was allowed by the Ordinary. An appeal was taken to the Superior Court, and on the trial of that appeal, the jury found that the applicant was not entitled to a homestead, as the head of a family, and judgment was entered upon that verdict. Afterwards, in January, 1871, the said Young again applied to the Ordinary for a homestead on the same land, which was allowed, and an appeal was again taken to the Superior Court. When the case was called in the Superior Court, Brown & Company, the appellants, moved the Court to dismiss the application for a homestead, on the ground that the right thereto was *res adjudicata*. The applicant then moved the Court to amend his petition for homestead by inserting an additional ground for homestead, to-wit: a new right of homestead which had accrued since the former judgment, but which was not included in his petition to the Ordinary. The Court refused to allow the applicant to amend, and dismissed his application for homestead. Whereupon, the applicant excepted.

If the appellant relied on the former judgment as a bar to the second application he should have pleaded the same in bar, and then the question would have been made whether, under the evidence submitted, and the law applicable thereto, the former judgment was a bar to the second application. In our judgment, the applicant had the right to amend his petition in the Superior Court so as to shew such facts as would entitle him to a homestead as the head of a family, which did not exist at the time of the rendition of the former judgment. Whether the evidence of his new right to a homestead as the head of a family would have been sufficient, under the law, to relieve him from the bar of the former

judgment, was the question to be tried, and about which we express no opionion; neither do we express any opinion as to the right of the applicant to have a homestead on the land as against the mortgage of Brown & Company. All that we do say is that he was entitled to be heard, and that the Court erred in dismissing his application without hearing the evidence in the case.

Let the judgment of the Court below be reversed.

WILLIAM D. OLIVEIRA, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

In an indictment against a magistrate for willfully and knowingly demanding more costs than he was entitled to by law, it is not sufficient as in ordinary cases to set forth the offense in the language of the Code. The indictment must, as the section creating the crime provides, "specially set forth the merits of the complaint," and is defective unless it specify the items of costs actually due as well as the amount demanded or received.

Criminal law. Indictment for malpractice. Arrest of judgment. New trial. Before Judge SCHLEY. Chatham Superior Court. May Term, 1871.

The plaintiff in error was put upon trial on the following indictment:

"GEORGIA—CHATHAM COUNTY:

The grand jurors, chosen, selected and sworn for the county of Chatham, to-wit: ...., in the name and behalf of the citizens of Georgia, charge and accuse William D. Oliveira, a Notary Public and *ex officio* Justice of the Peace of the county and State aforesaid, with the offense of malpractice in office. For that the said William D. Oliveira, in the county of Chatham and State of Georgia aforesaid, on the 16th day of May, 1870, while exercising the

functions, and in the administration and under color of his said office of Notary Public and *ex officio* Justice of the Peace, did then and there willfully and knowingly demand of and from one James Jenkinson the sum of $9.48 in the paper currency of the United States, as costs in a certain cause, wherein a possessory warrant for the recovery of a Newfoundland dog had been sued out against the said James Jenkinson by one Frank Lyons, and which had been heard and judgment rendered by him, the said William D. Oliveira, as Notary Public and *ex officio* Justice of the Peace, and which said sum of $9.48 was more costs than he was entitled to by law for the said services rendered by him in said cause, contrary to the laws of said State, the good order, peace and dignity thereof."

The jury returned a verdict of guilty. Whereupon, plaintiff in error moved in arrest of judgment upon the following grounds:

1st. Because there is no allegation in the indictment of what portion of the costs alleged to have been demanded by the defendant was illegal, or other and greater than the amount he was entitled to by law.

2d. Because the indictment fails to state whether defendant was entitled to any costs or not, and, if any, how much?

The motion in arrest of judgment was overruled and plaintiff in error excepted. A motion for a new trial was also made, which it is not necessary here to set forth.

P. W. MELDRIM, for plaintiff in error On the sufficiency of the indictment, cited Code, sections 4535, 4432; 13 Georgia Reports, 396; Wharton's Am. Crim. Law, 2511, *et seq.*; 1 Carnes, 133; Bishop's Crim. Prac., sections 321, 322, 325.

A. B. SMITH, Solicitor General, by brief, for the State. Indictment sufficient: Gould's Pleading, 460; Code, section 3529 to 3532; section 4535; 25 Georgia Reports, 689; 36 *Ibid.*, 449. Exceptions to form must be made before trial:

Code, section 4536; Bishop's Crim. Prac., 1st vol., 853; 25 Georgia Reports, 689; 36 *Ibid.*, 449; 37 *Ibid.*, 51–80. An indictment in Indiana is good against constable, wherein the sum extorted is not stated: 5 Blackf., 460.

McCAY, Judge.

The whole of this provision for the prosecution of public officers for malpractice, indicates the intention of the Legislature that the proceedings shall be guarded with more than ordinary strictness. The accused is entitled to notice of the charge, and to a copy of the bill of indictment, before the bill is found. He has, too, a right to go before the grand jury, to cross-examine the witnesses, and perhaps to bring forward matters in explanation and defense. The Act further provides that the indictment shall "specially set forth the merits of the complaint." This is far stronger language than is used in other indictments: Code, section 4432. Section 4535 provides, as a general rule, that it shall be sufficient to set forth the offense in the language of the Code. Something more must therefore be meant by the special provision of this section—4432. We think that these words mean that there must be set forth in the indictment a detailed statement of the facts upon which the charge is predicated.

This indictment does not do this. It charges him with having taken a certain amount for his costs in a particular case, and that such sum was more than the legal costs. But it fails to state what the legal costs were, and how much he took more than the legal costs. It might just as well have charged that he took more costs than the law permitted, and said nothing as to any amount. This is not a "specific" statement of the merits of the complaint. Properly it ought to be stated what service was done, and the costs for each item, as fixed by law, and then alleged he took more and how much more. As it is, the accused only is informed that he took too much, leaving him to grope in the dark as to what

items were overcharged and what he must prepare himself to meet.

Whilst we would be slow to put the least hindrance in the way of bringing to speedy punishment a corrupt officer, we must also remember that the law shows great tenderness to their errors as judges, and holds those who charge them with malpractice to more than ordinary strictness.

Judgment reversed.

WILLIAM W. MITCHELL and SIMON LEE, plaintiffs in error, *vs.* JOHN D. MCELVIN, defendant in error.

1. A colored child, born before the 9th day of March, 1866, within what was regarded as a state of wedlock between its parents, while slaves, and who is acknowledged by its father, is the legitimate child of both parents. If the parents separated before that date and the child remained with the mother, she is entitled to the control of it during minority. But if she voluntarily yield the control to the father, and he takes the child away with him, she cannot afterwards resume the control without the assent of the father, no reason being shown why the father should not retain the custody of the child.
2. If, under such circumstances, the mother is induced to sign articles apprenticing the child to a third person, under representations made to her by that person, that if she did not do so, he would send the child off to another State, out of her reach, the articles are void as against the rights of the father, and any master to whom he may have apprenticed the child; and on a writ of *habeas corpus* sued out at the instance of the person holding the articles from the mother against the father and the master to whom he had apprenticed the child, the child should have been remanded to the custody of the respondents; especially where the mother testifies that she does not desire to withdraw the child from the custody of the father, and that she was induced to sign the articles by the representations made to her.

Habeas corpus. Parent and child. Master and servant. Apprentice. Before Judge SCHLEY. Chatham county. At Chambers, August 1st, 1871.

This case arose upon a writ of *habeas corpus*, on the petition of John D. McElvin, alleging that Simon Bisset, an in-

fant, was his apprentice, and was illegally detained from him by William W. Mitchell and Simon Lee. Respondents moved to dismiss said writ, because it required them to respond in the county of Chatham, they being residents of the county of Bullock, and the alleged detention being in said county. The motion was overruled by the Court, and respondents excepted. Relator tendered in evidence a deed of apprenticeship of Simon Bisset, made by his mother, Sophia Bisset, to relator, on May 31st, 1871, to show relator's right to the custody of Simon, without proof that the duplicate articles had been filed in the office of the Ordinary. Respondents objected to the introduction of said instrument, the objections were overruled, and respondents excepted.

It appeared from the evidence that Simon Bisset was born in Bullock county, about fourteen years before the trial; that his mother, Sophia Bisset, and his father, Simon Lee, the respondent, were the slaves of different masters, but lived together as husband and wife, after the manner of slaves, for many years, and during this period the boy Simon was born; that just before the close of the war, Simon, the respondent, having become involved in a difficulty, had to run away, and when he returned his wife refused to live with him. When the Federal army passed through Bullock county, Sophia Bisset and her children moved to Bryan county; that about three years before the trial, Simon Lee, the respondent, went to Bryan county to see his former wife, and offered to help her take care of the children, saying that he had married another woman; that Sophia Bisset consented that he should take the two boys, one of whom was Simon Lee; that relator came to Sophia Bisset several times to persuade her to apprentice the boy to him; that finally relator told her that if she did not sign the papers apprenticing the boy to him, he would run the boy off to Florida; that he was badly treated by respondent, Simon Lee, and that he would not live with any one but relator. That under these circumstances she signed the deed of apprenticeship; that she always told relator that

the boy was under his father's control; that she had given him up to his father; that she did not want to sign the deed, and is now willing that the boy should remain under the control of his father.

The custody of the child was awarded to relator, and respondent excepted and assigns error upon each of the grounds aforesaid.

RUFUS E. LESTER, represented by P. W. MELDRIM, for plaintiffs in error.

HARTRIDGE & CHISHOLM, for defendant.

MONTGOMERY, Judge.

This case is controlled by the Act of March 9th, 1866, (Acts of 1865 and 1866, p. 240,) by the Act of December 12th, 1866, (Acts of 1866, p. 156–7,) and by Revised Code, section 1669. So long as the child remained with the mother, after her separation from his father, her husband, and after they were free, she was entitled to control it. Having voluntarily surrendered the custody of the child to its legitimate father, her right to control it ceased, no reason being shown why the father should be deprived of the custody of the child. The Court therefore renders the following judgment:

1. A colored child, born before the 9th day of March, 1866, within what was regarded as a state of wedlock between its parents, while slaves, and who is acknowledged by its father, is the legitimate child of both parents. If the parents separated before that date, and the child remained with the mother, she is entitled to the control of it during minority. But if she voluntarily yield the control to the father, and he takes the child away with him, she cannot afterwards resume the control without the assent of the father, no reason being shown why the father should not retain the custody of the child.

2. If, under such circumstances, the mother is induced to sign articles apprenticing the child to a third person, under

representations made to her by that person, that if she did not do so, he would send the child off to another State out of her reach, the articles are void as against the rights of the father, and any master to whom he may have apprenticed the child; and on a writ of *habeas corpus* sued out at the instance of the person holding the articles from the mother against the father and the master to whom he had apprenticed the child, the child should have been remanded to the custody of the respondents; especially where the mother testifies that she does not desire to withdraw the child from the custody of the father, and that she was induced to sign the articles by the representations made to her.

Judgment reversed.

ROBERT H. FOOTMAN, assignee, plaintiff in error, *vs.* PUSEY, JONES & COMPANY, defendants in error.

The Act of 1869, giving to mechanics a lien upon the property of their employers for labor performed and materials furnished, contemplates such mechanics only as perform the labor and furnish the materials to the employer. The Act does not contemplate a manufacturer of materials sold to the employer in the usual course of trade, although that manufacturer may be a mechanic.

Mechanics. Lien for materials furnished. Before Judge SCHLEY. Chatham Superior Court. May Term, 1871.

The sheriff brought into Court the proceeds of sale of the steamboat "Charles S. Hardee," which he had sold under a mortgage execution in favor of Robert H. Footman, assignee in bankruptcy of Robert Irwin and Charles S. Hardee, against one Henry Schaben. The defendants in error claimed precedence for their execution for $651.11, under the provisions of the Act of March 19th, 1869, and under the 30th section of the first Article of the Constitution of the State. To this proceeding the plaintiff in error filed his counter-

affidavit as provided by the 1970th section of the Code, upon the following grounds, to-wit:

1st. That the said Pusey, Jones & Company are not, nor is either of them, citizen or resident of this State, nor were such, at the time the labor was performed and materials furnished, as set forth in the affidavit.

2d. That the said materials were sent into this State by the said Pusey, Jones & Company, from the State of Delaware, and there placed upon the said steamboat by other persons not in the employment of the said Pusey, Jones & Company.

3d. That the said Pusey, Jones & Company are not, nor is either of them a "mechanic," laboring as such himself, but that they are contractors for mechanical work, employing others to do it under their direction.

The questions made by this counter-affidavit was submitted to the Court upon the following agreed statement of facts:

"It is admitted by the defendants in error in the above cause, that they are citizens of the State of Delaware and non-residents of the State. That the second ground of the affidavit of plaintiff in error is true. That the defendants in error do no manual labor themselves. It is admitted by plaintiff in error that the affidavit of the defendant in error is true with the above qualification as to manual labor. In addition, it is admitted by the said plaintiff in error that the materials and machinery set forth in the defendants in error's bill of particulars, were ordered by Erwin and Hardee, as agents of Schaben, the owner, to be made by defendants in error expressly for that steamer, the 'Hardee;' that they were made for that purpose by the workmen of defendants in error, and were sent out expressly for her by the defendants in error. And finally, that defendants in error are mechanics, literally, and that while they do no mechanical manual labor, they superintend their own journeymen and workmen in the execution of manual labor. Plaintiff in error further admits that the place of the contract between

the defendants in error and the owner of the steamer, the 'Hardee,' in pursuance of which the said materials were furnished and the said labor performed, was either in Georgia or Delaware."

The Court held that the execution of defendants in error was entitled to be paid out of said fund, and so ordered. Whereupon, plaintiff in error excepted.

JACKSON, LAWTON & BASINGER, by brief, for plaintiff in error.

CHARLES N. WEST, for defendants.

WARNER, Chief Justice.

This case came before the Court below on a motion to distribute money in the hands of the sheriff, arising from the sale of a steamboat, on the following agreed statement of facts: The plaintiffs are citizens of the State of Delaware, and non-residents of this State; that the materials were sent into this State by the plaintiffs, from the State of Delaware, and then placed on the steamboat by other persons, not in the employment of the plaintiffs; that the plaintiffs do no mechanical labor themselves; that the materials and machinery set forth in the plaintiffs' bill of particulars were ordered by Erwin & Hardee, to be made by the plaintiffs expressly for that steamer, the "Hardee;" that they were made for that purpose by the workmen of the plaintiffs and were sent out expressly to her by the plaintiffs; that the plaintiffs are mechanics, literally, and while they do no mechanical manual labor, they superintend their own journeymen and workmen in the execution of mechanical labor.

The question made by the record in this case is, whether the plaintiffs, on the statement of facts contained therein, are entitled to a mechanic's lien on the fund in Court, under the provisions of the Constitution of 1868 and the Act of 1869. The Constitution declares that "mechanics and laborers shall

WARNER, Chief Justice.

This case came before the Court below on appeal from the Court of Ordinary of Screven county. It appears from the record that Willis Young, Sr., as the head of a family, applied for a homestead, which was objected to by Brown & Company, his mortgage creditors, but was allowed by the Ordinary. An appeal was taken to the Superior Court, and on the trial of that appeal, the jury found that the applicant was not entitled to a homestead, as the head of a family, and judgment was entered upon that verdict. Afterwards, in January, 1871, the said Young again applied to the Ordinary for a homestead on the same land, which was allowed, and an appeal was again taken to the Superior Court. When the case was called in the Superior Court, Brown & Company, the appellants, moved the Court to dismiss the application for a homestead, on the ground that the right thereto was *res adjudicata*. The applicant then moved the Court to amend his petition for homestead by inserting an additional ground for homestead, to-wit: a new right of homestead which had accrued since the former judgment, but which was not included in his petition to the Ordinary. The Court refused to allow the applicant to amend, and dismissed his application for homestead. Whereupon, the applicant excepted.

If the appellant relied on the former judgment as a bar to the second application he should have pleaded the same in bar, and then the question would have been made whether, under the evidence submitted, and the law applicable thereto, the former judgment was a bar to the second application. In our judgment, the applicant had the right to amend his petition in the Superior Court so as to shew such facts as would entitle him to a homestead as the head of a family, which did not exist at the time of the rendition of the former judgment. Whether the evidence of his new right to a homestead as the head of a family would have been sufficient, under the law, to relieve him from the bar of the former

judgment, was the question to be tried, and about which we express no opionion; neither do we express any opinion as to the right of the applicant to have a homestead on the land as against the mortgage of Brown & Company. All that we do say is that he was entitled to be heard, and that the Court erred in dismissing his application without hearing the evidence in the case.

Let the judgment of the Court below be reversed.

WILLIAM D. OLIVEIRA, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

In an indictment against a magistrate for willfully and knowingly demanding more costs than he was entitled to by law, it is not sufficient as in ordinary cases to set forth the offense in the language of the Code. The indictment must, as the section creating the crime provides, "specially set forth the merits of the complaint," and is defective unless it specify the items of costs actually due as well as the amount demanded or received.

Criminal law. Indictment for malpractice. Arrest of judgment. New trial. Before Judge SCHLEY. Chatham Superior Court. May Term, 1871.

The plaintiff in error was put upon trial on the following indictment:

"GEORGIA—CHATHAM COUNTY:

The grand jurors, chosen, selected and sworn for the county of Chatham, to-wit: ...., in the name and behalf of the citizens of Georgia, charge and accuse William D. Oliveira, a Notary Public and *ex officio* Justice of the Peace of the county and State aforesaid, with the offense of malpractice in office. For that the said William D. Oliveira, in the county of Chatham and State of Georgia aforesaid, on the 16th day of May, 1870, while exercising the

ances or payments, and the same shall well and truly pay by November 1st, 1869, then this indenture, as well as said promissory note, shall cease and determine." The evidence showed that, after allowing all credits, defendant was still indebted to plaintiffs in the sum of $657.57 for advances; that advances were made after November 1st, 1869, in shape of drafts drawn by the defendant in favor of third persons, and of notes on defendant paid by plaintiffs; that no new contract was made in reference to these additional advances; that the business relations were continued after November 1st, 1869, as they had been carried on between the parties before; that defendant, after the date aforesaid, had shipped plaintiffs cotton and had drawn on them; that he had never notified plaintiffs that their former manner of doing business was at an end; that defendant did not notify plaintiffs that he was not drawing upon them under the mortgage as collateral security; that on the first day of November, 1869, defendant was indebted to plaintiffs the sum of $1,293.57; that cotton had been shipped by defendants to plaintiffs since the aforesaid date, but the proceeds, with the exception of the credit allowed, had been drawn out. The jury returned a verdict for the plaintiffs for the sum of $657.57. Whereupon defendant moved for a new trial, which motion was overruled by the Court, and defendant excepted upon the following grounds, to-wit:

1st. Because the verdict is contrary to law.

2d. Because the verdict is contrary to the evidence.

3d. Because the verdict is contrary to law and the evidence.

4th. Because the verdict is contrary to the charge of the Court.

5th. Because the Court erred in charging the jury "that said note sued on for $2,000, and the contract under which it was given, was a continuing contract, and that said note would, without an express agreement, cover as a collateral up to the amount of the note, any advances made by the plaintiffs to defendant after the first day of November, 1869, and

that plaintiffs could, in the suit on said note, recover on any balance due to them on such advancements made after said November 1st."

6th. Because the Court erred in charging the jury "that if defendant neglected to give notice to plaintiffs that said note for $2,000 ceased and determined upon the payment to plaintiffs by defendant of the amount covered by said note, as a collateral, the plaintiffs could recover in a suit on said collateral note any amount the jury might find due to plaintiffs at the commencement of the suit for advances, even though defendant had by said November 1st, paid plaintiffs all indebtedness for advances made up to that time, and although defendant had paid plaintiffs, before the commencement of said suit, all indebtedness before the date of said note, and the amount of $2,000, and commissions and interest for advancing the same."

7th. Because the Court erred in charging the jury "that the Court's construction of the contract, by which said collateral note was given, and which contract is contained in the mortgage deed given by defendant to plaintiff's, and in evidence on said trial, was that plaintiffs had agreed to advance to defendant, and that these advances were not to exceed at any one time $2,000; but that the contract, according to the Court's construction, did not mean that said note was to be collateral only for such advances as might be made from the date of said collateral note to said November 1, to the amount of $2,000."

8th. Because it being in evidence that the balance claimed by plaintiffs was a balance on open account, it was the duty of the jury, under the charge of the Court, so to have moulded their verdict as to protect the defendant against any subsequent suit upon said account, whereas the verdict is general for the plaintiffs.

W. H. Hobby, by brief, for plaintiff in error.

John C. Dell; J. R. Saussy, for defendants.

MONTGOMERY, Judge.

Homestead having been waived by the mortgage which secured the collateral note, given in this case, it became, in the opinion of counsel for the plaintiff in error, important to show that the debt to secure which the collateral note had been given, was paid off by the proceeds of the cotton shipped by Hilton to F. W. Sims & Company, after the time had expired, to secure the advances, during which the note and mortgage were given. Could this have been shown, then the application for homestead would have been relieved from the embarrassment of the waiver contained in the mortgage, which was signed both by husband and wife. To show this, counsel relied on that principle of law which applies payments by a debtor to his creditor to the oldest debts, where neither party make any appropriation of the payments. Unfortunately for the application of the principle in this case, both debtor and creditor applied the proceeds of the cotton received and sold, after November 1, 1869, to debts other than the debt due the factors, at that date, to-wit: to the taking up of drafts drawn by the debtor, in favor of third persons (thus showing *his* application of the funds) on his factors, the defendants in error, and the payment by them of those drafts, and an outstanding note or two of Hilton, due to a third person, thereby showing *their* application of the proceeds of the cotton sales. After payment of the notes and drafts, F. W. Sims & Company applied the balance of cotton proceeds to the debt due November 1, 1869, leaving still due, *of this debt*, just the sum found by the verdict, and for which the collateral securities are bound. The note and mortgage secured no advances made after November 1, 1869, but they were all paid by the cotton forwarded after that date, inasmuch as they consisted of debts due third persons, and paid, as before stated, by the factor, either at the instance of the planter himself, or of his own motion.

Judgment affirmed.

HENRY BIEBER, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

One who buys or receives goods, chattels, money or other effects that have been stolen, or feloniously taken from another, knowing the same to have been stolen, or feloniously taken, may be indicted as an "accessory after the fact," under the provisions of the 4420th section of the Code, that section creates and defines a distinct offense.

Criminal law. Accessory after the fact. New trial. Before Judge SCHLEY. Chatham Superior Court. January Term, 1871.

The plaintiff in error was tried upon an indictment, of which the following is the only portion material to be inserted:

"GEORGIA—CHATHAM COUNTY:

The grand jurors selected, chosen and sworn, for the county of Chatham, to-wit: ....., in the name and behalf of the citizens of Georgia, charge and accuse Henry Bieber, of the county of Chatham, and State of Georgia, aforesaid, with the offense of being an accessory after the fact, in buying and receiving stolen goods and chattels, knowing the said goods and chattels had been stolen and feloniously taken from another. For that the said Henry Bieber, in the county of Chatham, and State of Georgia, aforesaid, on the 27th day of December, 1867, did then and there, with force and arms, wrongfully and fraudulently buy and receive from Alonzo Jones, Butler Brown, John Johnson, William Roberts and Abram Henderson, persons of color, twenty-seven steel car springs," etc., "all the property of the Central Railroad and Banking Company of Georgia, a company incorporated under the laws of the State of Georgia, all of the aforesaid goods and chattels, each of the value aforesaid, having been before that time wrongfully and fraudulently taken and carried away, with intent to steal the same, from the possession of the said, the Central Railroad and Banking Company of Georgia, a com-

pany incorporated by the laws of the State of Georgia, by Alonzo Jones, John Johnson, Butler Brown, William Roberts and Abram Henderson, persons of color, as aforesaid, he, the said Henry Bieber, then and there, well knowing that the aforesaid enumerated goods and chattels had been wrongfully and fraudulently stolen and feloniously taken from another, and that the said Henry Bieber, with the knowledge aforesaid, did buy and receive the aforesaid goods and chattels, with the intent to defraud the Central Railroad and Banking Company." The indictment further set forth the plea of guilty of the principals to an indictment that had been found against them for simple larceny.

Upon the trial, John Johnson, one of the principals, was introduced as a witness for the State; the plaintiff in error objected to his competency, which objection the Court overruled. It appears from the record that William M. Wadley was the prosecutor. The jury found the plaintiff in error guilty, and recommended him to the mercy of the Court. Whereupon plaintiff in error moved for a new trial, which motion was overruled by the Court, and plaintiff in error excepted upon the following grounds, to-wit:

1st. Because the Court erred in overruling a motion to quash the indictment, on the ground that two of the grand jurors, who found the bill of indictment against the defendant, were stockholders in the Central Railroad and Banking Company, the said Central Railroad and Banking Company being the prosecutor.

2d. Because the Court erred in admitting the testimony of John Johnson, who, as the record discloses, was the principal thief.

3d. Because the Court erred in refusing to charge the jury, as requested by defendant's counsel, "that, in misdemeanors, there are no accessories, but all are principals, who are in any way concerned in the crime," and in charging "that the Code of Georgia had changed the law, and by the Code a person might be an accessory to a misdemeanor."

4th. Because the Court erred in refusing to charge the jury as requested, "that a party charged as an accessory to a misdemeanor cannot be convicted, as there is no such offense," and in charging to the contrary.

5th. Because the Court erred in refusing to charge the jury as requested, "that the receiver of stolen goods, when the original theft is a misdemeanor, is a principal, and cannot be convicted as an accessory," and in charging to the contrary thereof.

6th. Because the Court erred in refusing to charge the jury "that the crime charged being that of an accessory to a misdemeanor, wherein accessories are principals, the defendant cannot be convicted as an accessory, and not being charged as principal, he cannot be convicted as principal," and in charging, "that while it was true that the defendant could not be convicted as principal, unless so charged in the indictment, yet being charged as an accessory, he might be convicted as such."

7th. Because the Court erred in refusing to charge the jury "that while the Code makes a receiver of stolen goods an accessory, it only increases or adds to the number of classes of accessories, and that the new class is subject to the same rules as other classes of accessories," and in charging, "that this request had been fully covered by his previous charge."

8th. Because the verdict was contrary to law.

9th. Because the verdict was contrary to the evidence and against the weight of the evidence.

10th. Because the Court erred in refusing the new trial, because plaintiff in error has discovered, since he pleaded to the merits of said cause, that two of the grand jurors who found the said bill of indictment were stockholders in the Central Railroad and Banking Company, the prosecutor in this prosecution.

A. W. Stone; G. W. Wilson, represented by George S. Thomas, for plaintiff in error: 1st. Grand jurors must

be impartial: 1 Bishop Crim. Pro., 723; Wharton's Crim. Law, vol. 1, secs. 468, 469 and 473. 2d. The refusals of the Court to charge were error: 1 Russell on Crimes, 34; 4 Black. Com's, 35; 3 Greenleaf Ev., 43; Code, secs. 4420, 4421, 4343; 3 Greenleaf Ev., 48. 3d. The verdict does not speak the truth: 36 Ga. R., 222. 4th. The indictment is fatally defective: Code, secs. 4245, 4343; 1 Wharton Crim. Law, 296, 400; Bishop Crim. Proc., vol. 1, 751. 5th. Acts and declarations of joint offender, admissible only against himself: Code, sec. 3743.

A. B. SMITH, Solicitor General, by brief, for defendant. The demurrer was not made at the proper time, and was not in writing: Code, sec. 4545; 22 Ga. R., 499, 545; 24 *Ibid.*, 31; 25 *Ibid.*, 689. Everything presumed to be done rightfully: 1 Wharton Crim. Law, 713. Grand jury presumed to be properly constituted: 24 Ga. R., 270. Grand jury presumed to act correctly: 1 Bishop's Crim. Proc., 741. Oath of grand jury cannot be inquired into: 1 Bishop Crim. Proc., 750; 3 Wend., 314. New trial not granted unless necessary to substantial justice: 1 Chitty Crim. Law, 657. Interest in the jurors was too remote: 40 Ga. R., 423. No person excluded from crime or interest from testifying: Code, sec. 3798. Code, secs. 4420, 4421, provides for this particular case, and an accessory, as here defined, is different from that defined in Code, sec. 4243. Law applicable charged, requests need not be noticed: 38 Ga. R., 304; 37 *Ibid.*, 94, 102, 195. The real offense in this case was "the buying and receiving stolen goods:" 3 Ga. R., 419; 25 *Ibid.*, 689; 13 *Ibid.*, 322; 3 *Ibid.*, 18. New trial not granted where no rule of law is violated, no harm done: 40 Ga. R., 423; 39 *Ibid.*, 68; 40 *Ibid.*, 455.

WARNER, Chief Justice.

The defendant was indicted as an accessory after the fact in buying and receiving stolen goods and chattels, under the 4420th section of the Code. On the trial of the case, the defendant was found guilty, and a motion was made for a new trial, on the several grounds specified in the record, which motion was overruled by the Court, and the defendant excepted.

If the defendant had been indicted for a misdemeanor, as an accessory after the fact, under the 4243d section of the Code, we will not say that the objection urged by the defendant's counsel would not have been well taken, but the defendant was indicted under the 4420th section, which creates a *distinct offense;* that section of the Code declares that, "if any person shall buy or receive any goods, chattels, money, or other effects that shall have been stolen or feloniously taken from another, knowing the same to be stolen or feloniously taken, such person shall be taken and deemed to be an accessory after the fact, and shall receive and suffer the same punishment as would be inflicted on the person convicted of having stolen or feloniously taken the said goods, chattels, money, or effects so bought or received." The term, "feloniously taken," in this section, is used, not to indicate that the defendant is guilty of a *felony*, but to shew *the intent* with which the goods were taken from the owner by the principal thief. There was no error in admitting the testimony of Johnson: Code, 3798.

It is assigned for error that the Court overruled the defendant's motion to quash the indictment, after verdict, on the ground that two of the grand jurors who found the bill of indictment against the defendant were stockholders in the Central Railroad and Banking Company, the said Central Railroad and Banking Company being the prosecutor, which fact was not known to defendant until after the trial. The record shows that William M. Wadley was the prosecutor,

and not the Central Railroad and Banking Company. There is sufficient evidence in the record to sustain the verdict of the jury. In our judgment, the motion for a new trial was properly overruled.

Let the judgment of the Court below be affirmed.

SARAH HOUSTON *et al.*, plaintiffs in error, *vs.* WILLIAM DAVIDSON *et al.*, defendants in error.

1. Under the Act of 1816, illegitimate brothers and sisters, born of the same mother and their representatives inherit from each other in the same manner as if born in lawful wedlock, and if, at the death of an intestate, the brothers and sisters be all dead, their children take *per capita*, and not *per stirpes*, just as do legitimates under the same circumstances.
2. The Act of 1859, and the Code, section 2448, providing that representation among collaterals shall extend to the children and grand-children of brothers and sisters, extends also to distribution among the brothers and sisters of illegitimates and their representatives, but if all the brothers and sisters be dead, leaving children, and one of the nephews be also dead, leaving children, the division is still *per capita* among the nephews and nieces, the children of the deceased nephew or neice taking among themselves the share that would have fallen, under the *per capita* division, to their deceased parent.

Equity. Illegitimates. Rules of inheritance. Tried before Judge SCHLEY. Chatham Superior Court. May Term, 1871.

This was a bill in equity, filed by William Davidson and Rose Brice, formerly Davidson, against William J. Campbell, as administrator upon the estate of Susan Jackson, deceased, and the distributees of said estate. The bill set forth that, about the commencement of this century, a woman named Dolly, a free person of color, became the mother successively of the following named children, to-wit: Susan Jackson, Hettie Houston, Elizabeth Houston, Richard Houston, Robert Houston, and Mary Houston; that said Susan

Jackson, a free person of color, acquired considerable personal and real estate, and, without ever having a child, died in 1862, intestate; that Hettie Houston died in the lifetime of intestate, leaving two children, to-wit: Hettie Hanscomb and Priscilla A. Mirault, who are now living; that Mary Houston died during the lifetime of intestate, had two children, who are complainants; that Elizabeth Houston died during the lifetime of intestate, leaving two children, to-wit: Isabella Gordon, who died without issue in the lifetime of intestate, and Dolly Ann Drummond, now living; Richard Houston left surviving him two children, to-wit: Sarah Houston and Richard Ann Butler, who has died since the death of the intestate, and without issue; that Robert Houston died in the lifetime of intestate, leaving the following children surviving him, to-wit: Sarah H. Houston, Richard Houston, Robert Houston, Elizabeth Campbell, now the wife of S. F. Campbell, Ann E. Jackson and James Houston, who has died since the death of intestate and without issue, and William Houston, who has also died since the death of intestate, and without issue, and William Houston, who died previous to the death of the intestate, leaving one child, to-wit: Georgia Benton, now the wife of Henry Benton; that upon the death of the said Susan Jackson, the said Richard Ann Butler, Hettie Hanscomb, and Priscilla A. Mirault went into possession of the property of the estate and used the same until the death of the said Richard Ann Butler, in 1860; that after her death said Hettie Hanscomb and Priscilla A. Mirault received the rents and profits of said property until administration upon said estate. That on the ... day of ....., 1860, letters of administration were granted to William J. Campbell, who sold the real estate for the sum of $10,000, which said sum, less the expenses of administration, is now in the administrator's hands, to be distributed as the Court may direct. The bill prayed that said fund, and any other property belonging to said estate, might be distributed *per stirpes* among the brothers and sisters of intestate and their

representatives. The jury found the facts to be substantially as stated in the bill; also, the various amounts that had been received by the several distributees. They further found as follows: "We are unable to find how the said estate shall be divided amongst the said distributees, whether they shall take equally *per capita*, or unequally *per stirpes*, but leave that matter to the Chancellor, and find said distribution as he shall decide." Upon this special verdict, the Chancellor decreed that the distribution should be *per stirpes*, and plaintiffs in error excepted.

1st. Because the Court erred in decreeing that the estate of the intestate should be distributed *per stirpes*, as the brothers and sisters of the intestate all died in her lifetime, and her nieces and nephews stood to the intestate in equal degree, and should take equal shares, *per capita*, and not unequal shares, *per stirpes*.

2d. Because the Court erred in decreeing that Georgia Benton, the child of William Houston and grand-niece of the intestate, took an equal share with the uncles and aunts, children of Robert Houston, as among bastards there is no representation among collaterals further than children of brother and sister.

J. J. POPE, represented by JULIAN HARTRIDGE, for plaintiffs in error.

J. R. SAUSSY, for defendants.

McCAY, Judge.

The progress of civilization and the spread of correct ideas has now almost obliterated the old notion that illegitimates are outcasts. They do not inherit from the father, because the marriage tie—the proof that they are his children—does not exist between him and the mother. But no such proof being needed, as to their connection by blood with the mother, or with the brothers and sisters of her womb, they inherit.

It is in Georgia, now, only a question of *legal* proof of blood connection, since now legitimates and illegitimates inherit equally from the mother, and a legitimate brother or sister may, in some cases, inherit from an illegitimate: Code, 1791, 1792. So the marriage of the parents legitimates the children born before: Code, 1788. The whole spirit of our law is to put them on the same footing of legitimates, as to their mother and to the children of her womb.

We hold, therefore, that the Act of 1859, extending the principle of representation among collaterals to the grand-children of brothers and sisters, extends to the case where the estate for distribution is the estate of an illegitimate. The language of the Act is broad enough to cover the case. The Act of 1816 had provided that collaterals should take among themselves, as though the deceased were born in lawful wedlock. And why not? There may be good reason why there should be trouble as to how a bastard should inherit, but why inheritance *from* him should differ from inheritance from a legitimate, we do not see. The Act of 1816 and the Act of 1859, taken together, we think, extends the principle of representation to the grand-children of the brother of a bastard, in all cases happening while that Act is of force. The same principle is carried into the Code, and we see no reason to keep up a distinction which is not founded in common sense, or common charity, unless compelled to do so by express law.

Our Statute of Distributions before the Code, as to distribution among collaterals, is almost the words of the English Statute: 2 Blackstone, [515.] By the settled rule for the construction of that Act, if the brothers and sisters be all dead at the death of the intestate, the *next* of kin take *per capita*. The doctrine of representation only comes in when a portion only of the brothers or sisters have died, leaving children: See 2 Black. [517,] and this is a very reasonable and proper construction. So, by our law, up to 1859, representation among collaterals did not extend further than

to the children of brothers and sisters, and had the intestate died before 1859, the distribution would have been *per capita* among the living nephews and nieces alone, since there were no uncles or aunts. After 1859, the Statute of Distributions stood altered so as that the child or children of the intestates' nephews and neices are entitled. The Code expresses the same idea, section 2448, by declaring that "the children or grand-children of brothers and sisters shall represent and stand in the place of their deceased parents." The only question there can be as to these changes in the general law on the subject of representation among collaterals, is, whether it was the intention of the Legislature to keep up the English rule, that when the collaterals do not all stand in equal degree, the distribution is *per stirpes* and not *per capita.* Without doubt, it is the rule, that if any of the brothers or sisters be living, and there be children living of deceased brothers or sisters, then, as those entitled do not stand in equal degree, the distribution is *per stirpes.* But if the brothers and sisters be *all* dead, then, by the English rule, as representation stops, and those who take it all must take in equal degree, the distribution is always *per capita.* Our Act of 1859 extends the principle of representation to grand-children of brothers and sisters, and by applying the English principle, if those who are entitled, not standing in equal degree, the distribution is to be *per stirpes.* So that in this case, the Court below has made the distribution *per stirpes;* that is, he has divided the whole into as many parts as there were brothers and sisters living, and given to each set of nephews a share. Then divided that share among the nephews, giving to the children of a nephew, when that nephew is dead, their father's or mother's share. In other words, the Court has declared that, as it has so happened, that there are *grand-children* of a brother, the old rule, which made the division *per capita,* when all the brothers and sisters were dead, is changed, and the division is *per stirpes,* even among the nephews.

We do not think this was the intent of our Act of 1859, nor of the Code. The words of the Act of 1859 simply amend the Act of 1804, "so far as it restricts the distribution of intestates' estates among collaterals to the child or children of intestate's brothers and sisters, by providing that it, to-wit: the distribution, shall "extend to and embrace the child or children of intestate's nephews and nieces." We do not think, therefore, it was intended to change the *manner* in which the nephews and nieces were to take, but *only* to provide that the grand-children of a brother or sister should take their father's share; that they should be let in, even though all of the class next above them in the scale should not be dead.

We think, therefore, the true rule under the Act of 1859 and of the Code, is, that the grand-child of a brother or sister shall simply stand in his father's place; that the estate shall be distributed as though his father were living, and he shall represent him. If the nephews and nieces be all dead, then the distribution is *per capita*, no matter who takes. But if any of *them* be living, it is distributed, as though they were all living, the children of each one deceased standing in place of the parent. In other words, as by the rule, if the brothers and sisters be all living the distribution is *per capita*, so if nobody but nephews and nieces take, it is *per capita*. But, if one brother be alive, and *must have his full share*, the distribution is therefore *per stirpes*. So if all the brothers and sisters be dead, any nephew or niece *must have his full share*. This can only be done by dividing it *per capita*, as to nephews and nieces, if there be any of that class living, and admitting the children of any deceased nephew or niece to the parent's place. The object of the rule is that those *nearest* of kin shall always get just the share they would have got if all of equal degree with them were living. This can only be done in a case where all the brothers and sisters be dead, by distributing, *per capita*, to the nephews and nieces, as though they were all alive, and allowing their children, if any nephew or niece be dead, to stand in the place of the

parent. The *nearest* in blood thus get the largest portion, and equal portions, and those who come in by representation take the place of their parent. The rule adopted by the Court below gives those nearest and equal in blood *unequal shares.*

It is, therefore, our opinion that the principles of the common law and the intent of our Legislature, in making the change, will be best carried out by holding, that if all the brothers and sisters be dead at the death of the intestate, then the distribution is between the nephews and nieces, *per capita*, and if any of them be dead, leaving children, distribution is to be made as though the nephews and nieces *were all alive*, the children of the deceased nephew or niece standing in place of the parent.

Judgment reversed.

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WILLIAMS & LEE, plaintiffs in error, *vs.* ROBERT E. WYLLY, defendant in error.

Under the provisions of the Code, the vendor of a chattel (in the absence of any express warranty) warrants that the article sold is merchantable, and reasonably suited to the use intended, and that he knows of no *latent* defects undisclosed, and a partial failure of consideration may be pleaded to such sale against the vendor of the chattel, when the defect in the chattel was not *apparent* to the purchaser at the time of the sale and not *disclosed* by the seller, especially when the evidence shows that the vendor knew of the defect in the chattel sold prior to the sale.

Failure of consideration. Warranty. Sale. Before Judge SESSIONS. Pierce Superior Court. September Term, 1871.

For the facts of this case, see the decision.

W. B. FLEMMING; W. H. DASHER, represented by S. B. SPENCER, for plaintiffs in error.

No appearance for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiffs, who were partners, against the defendant, on a promissory note. The defendant pleaded a partial failure of consideration, alleging that one of the mules for which the note was given was unsound at the time of the sale, and was of no value; and that the consideration, so far as that mule was concerned, had failed, to-wit: in the sum of $150, of which the plaintiffs then and there *had notice*. On the trial, it appears from the evidence in the record, that the plaintiffs sold to the defendant two mules and a wagon, one of the mules being blind; that the defendant had paid the plaintiffs $150, which was credited on the note. One witness testified that the unsound mule, which died, was the inducement to the purchase. It also appears from the evidence that the mule was sick before the sale; and one witness testifies that Lee, one of the plaintiffs, was told before the sale that the mule was sick and diseased, and would die on his hands. To which he replied: "Well, patch him up; perhaps he would get well enough to sell, and we will get rid of him." Shortly after the purchase the mule died; and after the death of the mule, Lee, one of the plaintiffs, said that the mule was not worth anything, and defendant ought not to pay for him. The Court charged the jury that, if they found, under the evidence, that the mule was sick or diseased at the time of the sale, and died of the disease, that it was a partial failure of consideration, and defendant entitled to a verdict. The jury found for the defendant, and the plaintiffs made a motion for a new trial, on the ground of error in the charge of the Court, and because the verdict was contrary to the evidence, which motion was overruled, and the plaintiffs excepted. The error alleged to the charge of the Court is, that this defense, of partial failure of consideration was not a good defense to the note under the facts of the case, unless there had been a warranty of the soundness of the mule, or deceit on the

part of the plaintiffs when the sale was made. Whatever may have been the rule by the common law in relation to this question, our Code has modified that rule, if it has not entirely changed it. "If the consideration, apparently good or valuable, fails, either wholly or in part, before the promise is executed, such failure may be pleaded in defense to the promise. If it be *partial*, an apportionment must be made according to the facts of each case:" Code, section 2706. "Whenever an action shall be commenced at common law, founded upon *any contract*, the defendant in such action may plead and give in evidence to the jury, upon the trial thereof, that the consideration upon which said contract was founded has totally or *partially* failed. Such plea shall only be pleaded in cases between the original parties to the contract, or their privies or assignees, whose title has been acquired with notice, actual or constructive, or by operation of law:" Code, 3421.

If there is no express covenant of warranty in the sale of a chattel, the seller warrants that he has a valid title, and right to sell; that the article sold is merchantable and reasonably suited for the use intended; that he knows of no *latent defects undisclosed:* Code 2609. In this case the evidence is that one of the plaintiffs, who were partners, knew that the mule was diseased, which fact was not apparent to the purchaser, nor disclosed by the seller. Although the charge of the Court may not have been technically correct, yet it was substantially so in view of the facts of the case; and when it appears from the evidence in the record that justice has been done, a new trial should not be granted: Terhune *vs.* Dever, 36 Ga. R., 653.

Let the judgment of the Court below be affirmed.

STEPHEN HOLLINGSWORTH, plaintiff in error, *vs.* OLIVER SMITH *et al.*, defendants in error.

Where one had procured a homestead to be set off to him under the Constitution of 1868, in a certain tract of land, and had filed a bill against a creditor, who was about to sell the same, under a judgment, for the purchase-money, and the Court refused to charge the jury "that if they should find that the debt was, in fact, for the purchase-money, and the homestead, therefore, subject, they might still enjoin the execution as to fifty acres of the land, on the ground that this was exempt from levy, under section 2018 of the Code:"

Held, That there was no error in this refusal to charge; such a decree would have been foreign to the objects of the bill, and an improper finding, under the pleadings in this case.

Injunction. Homestead. Before Judge GREEN. Upson Superior Court. May Term, 1871.

Stephen Hollingsworth filed his bill against Oliver Smith and John A. Cochran, as administrator upon the estate of John W. Pate, deceased, in which he alleged that, on October 20th, 1860, complainant and said Pate purchased from Oliver Smith, jointly, a certain tract of land, for the sum of $1,600, one-half of which sum was to be paid in cash, and the other half at a future day; that complainant paid $800 in cash, and that it was agreed that the said Pate should pay the balance. Complainant set up a homestead in said land, laid off to him under the Act of 1868, and prayed an injunction against the sale of the same, under an execution in favor of said Smith for the balance of the purchase-money, and also a writ of partition, as against the administrator of Pate, deceased. Upon the trial, the evidence as to the agreement above set forth was conflicting.

Complainant requested the Court to charge, "that if the jury should find that the homestead, under the Act of 1868, would not be available, and which was one of the questions involved in this case, then the jury might still find and decree an injunction against the execution of Oliver Smith temporarily restraining it, as to fifty acres of said land, under

section 2013 of the Code, if they believed complainant was the head of a family," which charge the Court refused to give, and, on the contrary, charged the jury as follows: "If you believe that complainant has made application for a homestead, under the Constitution of 1868, and subsequent legislation under said Constitution, and that the same has been allowed him by the Ordinary, you should not decree a temporary injunction against the defendant to give complainant time to apply to the Ordinary, under section 2013 of the Code. The Court does not hold that complainant is not entitled to a homestead, under said section, but, in the event that you find a homestead has been laid off and assigned, under the Constitution of 1868, according to law, you cannot now, in this proceeding, inquire as to his right to a homestead, under section 2013 of the Code." To which charge, as given, and refusal to charge, complainant excepted, and now assigns the same as error.

A. M. SPEER, by brief, for plaintiff in error.

SMITH & ALEXANDER; JOHN I. HALL, represented by the REPORTER, for defendants.

McCAY, Judge.

It is true that the Act of 1868 authorizes any one who does not desire to take advantage of its provisions, if he pleases, to seek the benefit of the old exemption law, as provided by the Code. But there was nothing in this bill or answer or in any of the proceedings to authorize the charge asked for. The bill and the answer make the issue that was on trial, and there was nothing in either to call for the request made. The issue was whether the homestead, as set apart by the Ordinary, on the petition, was or was not subject to the *fi. fa.* That was the thing the jury was to pass on, and the question whether, if a wholly different petition had been made, and a wholly different proceeding taken, the exemption

procured under such other petition and proceeding, would have been subject to the *fi. fa.*, was a matter wholly foreign to the case before the Court, and we think the Judge was perfectly right not to charge as asked.

Judgment affirmed.

RICARD H. SIMS, plaintiff in error, *vs.* JOHN O. FERRILL, administrator, defendant in error.

1. When a bill charges that complainant was induced to sell land to defendant by representations of the latter, that the title was defective, and the defendant is also charged as standing in a fiduciary character to complainant, and that complainant would not have sold but for such representations, which were not true, it is not error to allow complainant to prove her conversations before the representations made to her, with a third person, in which she said she had no desire to sell, for the purpose of showing the state of her mind as to her willingness or unwillingness to sell before the representations were made, especially when defendant alleges she was always willing to sell, independently of any representations made by him to her.
2. If one of the counsel makes marginal marks on a paper which goes out with the jury to direct himself in argument, it is no error in the Court to refuse to compel him to rub them out before the paper goes to the jury—it not appearing that those marks conveyed any idea affecting the merits of the case.
3. Where an answer in equity is waived, the answer is not evidence against the allegations in the bill. Any admissions, however, made in the answer, stand upon the same footing with any other admissions of defendant and may be relied on by complainant as evidence of the facts admitted. The whole answer being before the jury. and the admissions being subject to such qualifications as may be gathered from other facts of the answer; but the jury are not bound to believe the qualifications.
4. A sale of land of a testator or intestate by the executor or administrator, in the manner prescribed by law, where the estate is insolvent, divests the liens of judgments obtained in the lifetime of the testator or intestate, and the creditor must look to the proceeds in the hands of the representative of the estate.
5. Trust and confidence reposed in a brother-in-law by his widowed sister-in-law requires the utmost good faith and fair dealing in any cou-

tract of sale between them. A misrepresentation of the law by the brother-in-law to his sister-in-law, whereby she is led to believe her title to property held by her is invalid, and on this account she sells it to him, which sale is much to his advantage, vitiates the sale at her election, even though such misrepresentation was made in good faith.

6. Where, under the foregoing relations of trust and confidence, a sale is effected between the parties during the war, for Confederate money, which is to be paid in cash, and the brother-in-law applies a portion of the money to the extinguishment of a lien, supposed to rest upon the property without the widow's consent, but in accordance with what he alleges, and she denies to have been the bargain, pays the widow a portion, and retains a large portion in his own hands, without her consent, and for which he does not clearly account, she is entitled to a decree setting aside the sale upon her accounting for the Confederate money actually received by her at a fair valuation.
7. There is evidence to sustain the verdict of the jury in this case, and we find no material error in the charge or refusals to charge of the Court.

Equity. Evidence. Confidential relation. Conduct of counsel. Admissions. Judgment lien. Sale by executor. Rescission. Before Judge GREEN. Spalding Superior Court. August Term, 1871.

This case came on to be heard upon a bill filed by Mrs. Ann E. Ferrill against Richard D. Sims; in which complainant alleges that she is the widow of Benjamin W. Ferrill, deceased; that said Benjamin W. Ferrill conveyed to her by his will a certain lot of land, with the improvements thereon, situated in the county of Spalding; that John Q. A. Alford was appointed executor by said will; that said executor proceeded to sell said lot, for the purpose of paying off the debts of said estate, and that on April 17, 1863, said lot was knocked off to complainant for the sum of $500; that a few months after she purchased said lot, one Thomas J. Threlkeld, who is a brother-in-law of defendant, told your oratrix that a gentleman had told him that he would give her $6,000 for the place; that complainant replied: "Does that gentleman think I am crazy, that I would take such a price?" That a week or two afterwards defendant came to see

her about selling the lot, and advised her to dispose of the same; and urged that she had best advertise the place by hand-bills; that complainant consented; that defendant had the hand-bills printed, and called upon her for money to pay for them; that complainant was disposed to follow the advice of defendant, because she was nearly related to him by marriage, and was herself inexperienced; that she was easily imposed on, especially as she had then the utmost confidence in the judgment, business capacity and good faith of said defendant; that from the fact of defendant's subsequent management in buying the said place, and from the fact of his near relationship to the said Thomas J. Threlkeld by marriage, and their intimate connection, and from the fact that said defendant so soon thereafter commenced advising her to sell said place, complainant believes and charges that the said Thomas J. Threlkeld was requested by said defendant to begin the negotiations for him in that way; that said defendant endeavored to discourage persons from buying said place, by telling them that she could not make good titles to the same; that soon after defendant commenced advising her to sell, he told complainant that George Prothro had some old executions against her deceased husband, and that said Prothro would come and claim the place at the end of the war, and that it would take the whole place to satisfy the executions; that complainant would be turned out without a home, and that the best thing she could do would be to sell the place. Defendant further advised complainant that she ought to use the proceeds of said place in the purchase of negroes, in Southwestern Georgia, and commence farming. Complainant then asked defendant why not go to farming up here. Defendant replied that the lands there were much better than up here, and that he would give more for the place than any one else; that he would give $10,000 for the place, which proposition complainant accepted; that all of these occurrences transpired in the summer of 1863. Complainant further charges that on the day after she executed

the deed to defendant, he told her he would have to pay off the Prothro executions; that she told him she could have done just as well by letting Prothro take the place, for she would now be put to the trouble of moving, and get nothing; that defendant, on October 17th, 1863, paid to her $3,000 in Confederate money, then worth from $200 to $250, in gold, saying that was all that was coming to her, after deducting the amount of the Prothro executions; that defendant moved into the house on October 13th, 1863, and complainant moved out on the 17th of the same month; that defendant, as soon as he had moved in, and before complainant had moved out, said: "I am in here now, and nothing but death or law will ever get me out." Complainant charges that she fully relied on defendant for advice, and that she would not have sold said place, had it not been for his advice; that defendant made the false and fraudulent representations as to the liability of said place to the Prothro executions for the purpose of purchasing it for himself; that she waives discovery. Complainant prays a cancellation of the deed made by her to defendant, a rescission of the contract of sale, an account for the rent of the premises, valued at $500 per annum, and offers to credit the defendant with the value of the Confederate money paid to her. The answer of the defendant denied every material allegation in the bill.

The complainant died pending the suit, and her administrator was made a party. In the progress of the trial the conversation of complainant with Thomas J. Threlkeld was admitted in evidence by the Court, over the objection of the defendant, for the purpose of showing her unwillingness to sell her place. It appeared that the defendant was the brother-in-law of Mrs. Ann E. Ferrill. The evidence was conflicting, and as the errors alleged to have been committed are fully stated in the exceptions to the decision of the Court on the motion for a new trial, it is unnecessary to set it out here. The jury returned the following verdict: "We, the

jury, find for the plaintiff, putting aside the sale, allowing the plaintiff $200 per annum rent, and allowing defendant $1,250 for improvements, and for the $3,000 purchase-money paid, $220 in currency, with interest from the date of sale." Whereupon defendant moved for a new trial, which motion was overruled by the Court, and defendant excepted upon the following grounds, to-wit:

1st. The Court erred in not withdrawing from the consideration of the jury, upon the motion of defendant's counsel, the conversation between Mrs. Ferrill, complainant's intestate, and Thomas J. Threlkeld, relative to the sale of said property in controversy, as testified to by Mrs. Ferrill by interrogatories in said cause.

2d. The Court erred in overruling the objection of defendant's counsel, made when the interrogatories of Mrs. Ferrill were being read to the jury, because the sayings of Thomas J. Threlkeld were not competent evidence in said cause, as testified to by her.

3d. The Court erred in charging the jury: "That if you believe from the evidence that complainant bought the land in dispute at executor's sale, her title to the same was good and valid, and not subject to the payment of the judgments against the intestate," because said charge was not only erroneous, but well calculated to mislead the jury, that question not being properly made an issue by proper parties, or proper averments before the Court, in the pleadings or evidence.

4th. The Court erred in the following charge: "If the jury shall believe from the evidence, that the relationship of confidence still existed between Mrs. Ferrill and Sims, by reason of kinship or agency, or of both, and that during the existence of this relation the contract in question was made, then the burden of proof was on Sims to show that the contract was in accord with the free will and interest of Mrs. Ferrill, when said contract is attacked for fraud, and that he must show this by clear and satisfactory proof, and if he has not done so in this case the jury must set aside the sale."

5th. The Court erred in the following charge: "That if you believe from the evidence that the defendant, by himself or agent, induced the complainant to sell him the premises or lands in dispute through fraud, deceit or misrepresentation, the sale ought to be set aside," there being no proof that the defendant had any agent in this transaction, from beginning to end, and the charge being otherwise unauthorized by the facts of the case.

6th. The Court erred in the following charge: "If you should believe that the complainant sold said land to the defendant, influenced thereto by the fear or belief that her title was doubtful or encumbered by judgments against the estate of B. W. Ferrill, when it was neither in truth doubtful nor encumbered; and if the defendant, by his statements or expressed opinions, created or contributed to that fear or doubt, you should set aside the sale, whether honestly or dishonestly made, or in good or bad faith;" said charge being calculated to confuse and prejudice the jury, and not authorized by the facts.

7th. The Court erred in the following charge: "That if the complainant sold the land to the defendant for the sum of $10,000, cash, the burden of proof is on the defendant, to show that he has paid the complainant the $10,000, or to some person, by her express order and direction."

8th. The Court erred in the following charge: "If you should believe that the sale was fair and *bona fide*, and that complainant made said contract freely and voluntarily, but defendant has failed to pay her the full and entire amount of the purchase-money, or any portion of it, the complainant is entitled to recover the amount, according to the value of the property, at any time, from the date of the contract to the present time, with interest thereon; allowing defendant for the amount paid, (if in Confederate money,) the value of said money at the time of payment," such not being the law of this State.

9th. The Court erred in the following charge to the jury:

"That if you should believe that the defendant applied any portion of the purchase-money to the payment of the Prothro *fi. fas.*, it was not payment, or part payment, or discharge of his indebtedness to complainant for said land, unless complainant freely, voluntarily, and of her own will, expressly ordered and directed, uninfluenced by the expressed opinions or statements of the defendant, or that of his agent, that said land was subject to the payment of said *fi. fas.*"

10th. The Court erred in charging the jury, "that the defendant could not use the money due complainant to secure or get a transfer of the Prothro *fi. fas.* to himself by his own act, and if he did so, he did not relieve himself from his liability or indebtedness to her," there being nothing in the testimony to warrant the Court in so charging, and the charge being otherwise unauthorized by the law of the case.

11th. The jury found contrary to the following charge of the Court, to-wit: "It is the duty of the jury to reconcile all of the testimony if possible, and they must adopt that theory of the case which will reconcile all and impute perjury to none."

12th. The Court erred in the following charge: "A witness who swears positively must be believed in preference to one who swears negatively," there being no such state of facts in the case to justify such a charge; and in the following charge, upon the same ground: "A witness who testifies clearly and certainly must be believed in preference to one who is interested, changing and qualifying," because in giving this as a rule of law the Court gave a rule by which the witness' credit was to be attacked, instead of a rule of law by which the value of the testimony was to be determined; and in still adding: "A witness who is disinterested, straightforward and explicit, must be preferred to one who is interested, changing and qualifying," there being nothing in the case to authorize such a charge.

13th. The Court erred in the following charge: "A witness, and especially a party as his own witness, who is clearly

contradicted in a material statement by a disinterested and unimpeached witness, ought not to be believed as against one not so contradicted," without adding the qualification, "not so interested," there being nothing in the testimony justifying such a charge, but the contrary.

14th. The Court erred in the process of the trial and before the jury, as follows: When the defendant's counsel, on coming to read his answer, and finding a number of long and short cross marks and points, with several figures on the margin of the answer in pencil and ink, and on leave of the Court proceeded to rub them out as well as he could, and the same counsel on the final argument discovered that the concluding counsel was again marking the same or similar marks along on the margin of the answer, and objected to the same, and moved again for leave to strike them out, when complainant's counsel refused to strike out said marks and points, and stoutly maintained his right to put and keep them there, the Court refused to allow or direct said marks and points to be stricken out and permitted the concluding counsel to read such marked and pointed portions of said answer to the jury, and allowed the answer to go out to the jury thus marked and pointed.

15th. The Court erred in refusing to charge, as earnestly requested by defendant's counsel, "that if complainant's solicitors should read any part of defendant's answer as an admission, or as pleading, or as part of the evidence in the case, that they had no right to submit detached parts of the same, but that the whole statement of defendant is thereby made evidence and must be taken as a whole statement," and in charging, "that the answer is not evidence to contradict allegations in the bill, but is evidence as an admission against the defendant."

16th. The Court erred in charging the jury, "that one positive witness is to be believed in preference to any number of witnesses; where one testifies that he saw a certain thing happen and any number of witnesses may swear that

they did not see it, and yet none may have committed perjury," because the evidence in the case did not justify such a charge, and the language was well calculated to mislead, confuse and prejudice the jury's mind.

17th. The Court erred in the whole of said charge as applied to the case, said charge being erroneous and calculated to, and did, no doubt, prejudice and influence the jury against the defendant.

18th. The Court erred in refusing to charge the jury as requested by defendant's counsel: "That if the jury should find that there had been a mistake of law, unless it was brought about by the defendant, it is not sufficient to annul a contract of sale."

19th. The Court erred in refusing to charge the jury as requested by counsel for defendant: "That if the parties were mutually ignorant of the law as to the lien of the Prothro *fi. fas.*, and they made the contract in good faith, and mutually agreed to leave the question to the decision of an attorney, and he gave an erroneous opinion, by which both parties were misled, such a mistake is no ground for setting aside a contract of sale."

20th. The Court erred in refusing to charge the jury as requested by counsel for defendant: "In setting aside the contract of sale for fraud, the jury may consider the confidential relationship of the parties, but what the law means by confidential relationship is such as parent and child, guardian and ward, principal and agent—this relation is not established simply because the parties are brother-in-law and sister-in-law, but requires something more."

21st. The Court erred in giving in charge to the jury in his general charge the first two requests of complainant's counsel, as follows: "If the jury shall believe from the evidence that relation of confidence existed between Mrs. Ferrill and Sims, by reason of kinship or agency in Sims, or both, and during the existence of this relation, the contract in question was made, then the burden of proof is on

Sims to show that the contract was made in accordance with the free will and interest of Mrs. Ferrill, and that he must show this by clear and satisfactory proof, and if he has not done so in this case, the jury must set aside the sale. If the jury shall believe that the relation of confidence did not exist, yet if Mrs. Ferrill made the contract, influenced thereto by the fear that her title was doubtful or encumbered, when it was in truth neither doubtful nor encumbered; and if Sims, by his statements or expressed opinions created or contributed to that fear or doubt, the jury must set aside the sale, whether Sims was honest or dishonest in his statements," and the remaining requests by reading them and giving them in charge after the general charge, as follows: "If the jury shall believe that Mrs. Ferrill made the contract freely and of her own motion, and without mistake, and on an equal footing with Sims, yet if the consideration on the face and by the terms of the contract was $10,000 cash, then the burden of proof is on Sims to show that he has paid the $10,000 to Mrs. Ferrill, or to some other person by her express order and direction. That Sims could not use the money due Mrs. Ferrill in securing a transfer of the Prothro *fi. fas.* to himself by his own act, and if he did so, he did not discharge himself from his indebtedness to Mrs. Ferrill. If the jury shall set aside the sale under either of the two first propositions, they must decree a restoration of the property with the rent as proven, less the value of the money paid by Sims to Mrs. Ferrill, and less the amount actually paid out for substantial and permanent improvements. If the jury affirm the sale under the third or fourth proposition, they may decree the complainant the present value of the property, less the value of the money with interest thereon actually paid by Sims to Mrs. Ferrill," the same being unfounded in law and not justified by the evidence, and the law of the case, and by which an undue and prominent importance was given to the requests of complainant's solicitor.

22d. The verdict of the jury was contrary to the evidence

and the charge of the Court, in this, that the sum of $3,000, paid by the defendant to the complainant, was a payment of $3,000 in said purchase, and it was error in the jury to scale said amount to the sum of $250, the value, in United States currency, of said payment.

23d. The Court erred in refusing a new trial, upon the following grounds: 1st. That the charge of the Court was contrary to law, and not warranted and sustained by the facts of the case. 2d. That the verdict of the jury was contrary to evidence, and to the weight of evidence, and without law to support it.

C. PEEPLES; E. W. BECK; J. D. STEWART, for plaintiff in error.

B. H. HILL & SONS; D. N. MARTIN, for defendant.

MONTGOMERY, Judge.

In this case, the evidence is very conflicting, but that was a matter for the consideration of the jury. According to the case as made by the complainant, the defendant in error, the material facts are as follows: Benjamin W. Ferrill died in December, 1861, leaving a widow, Ann E. Ferrill, (the intestate of defendant in error,) to whom he left his residence and about eighty acres of land. By his will, he left F. O. A. Allford his executor. Allford qualified, and subsequently sold the house and land left to the widow, at executor's sale, to pay debts, as stated in the bill. The widow purchased the property through her brother-in-law, the plaintiff in error, and received titles from the executor. Shortly after, Thomas J. Threlkeld, a brother-in-law of R. H. Sims, the plaintiff in error, told her that a gentleman would give her $6,000 for the place. She informed him she did not desire to sell. After this, Sims advised her to sell, telling her that a Mr. Prothro held a judgment against her husband, which was a lien on the property, and that, at the close of

the war, it would be in his power to sell her out. Reposing trust and confidence in Sims, as her brother-in-law, she acceded to his advice, and asked him to assist her in the sale. He had hand-bills, offering the property for sale, struck off for her, and told her to ask $10,000 for it. This was in 1863, and the price named was in Confederate money. Several persons looked at it to buy, among others, I. G. Drake, (a witness for Sims,) who said Mrs. Ferrill offered him her place at $10,000, but he declined to give it on account of the supposed cloud over the title, caused by the outstanding judgment of Prothro. Sims advised him to buy. Ultimately, Sims agreed to give the widow $10,000 cash for the place, and she agreed to take it. She made him a deed before receiving any money, and afterwards he offered her $3,000, and told her he had taken up the Prothro *fi. fa.*, and that the sum offered was all that was coming to her. She, at the time, left the money where he placed it, in some indignation at the small amount offered her, but afterwards received it from him, by express, in Albany. Other parts of the evidence show that the Prothro *fi. fa.* amounted to about $4,000. It nowhere appears that Sims ever paid the balance due, about $3,000. Sims denies his fiduciary relationship to the widow, and says she knew of the existence of the Prothro judgment before he told her of it, and feared it had a lien on her property, and that she greatly desired to sell on that account, before he spoke to her upon the subject. He also says it was distinctly agreed that he should take up the Prothro *fi. fa.* with a portion of the money.

All this conflict of testimony was proper for the jury to pass upon. but does not present itself in such a shape as to justify this Court in setting aside the verdict. It may be remarked, however, that the testimony of I. G. Drake, a witness introduced by the defendant himself, seems to corroborate the evidence of the widow, that the $10,000 was to be paid to her, and the purchaser was to take the risk of the Prothro judgment. The answer of the defendant was waived, and was

not sworn to. During the trial, complainant was permitted to prove, over defendant's objection, the sayings of Mrs. Ferrill to Threlkeld, for the purpose of showing her unwillingness to sell prior to Sim's conversations with her about the defectiveness of her titles. One of the counsel for complainant, during the trial, made marginal marks on the defendant's answer to direct himself in argument. Defendant moved the Court to compel him to strike them out, which the Court refused. It did not appear that those marks conveyed any idea affecting the merits of the case. In the course of the argument, counsel for complainant read certain admissions of the answer to the jury as evidence of the facts contained in them, the whole answer being before the jury as pleading, but not as evidence. Counsel for the defendants objected to this, unless the whole answer were admitted as evidence before the jury. The bill was filed to set aside the sale and for an accounting. The case, in behalf of complainants, was presented to the jury in two views: 1st. That the sale was fraudulent and should be set aside. 2d. That if not fraudulent, the complainant was entitled to an account for the unpaid balance due on the purchase. The jury found a verdict setting aside the sale. Many of the assignments of error are upon the charge of the Court on the right of complainant to an accounting. The jury having rendered a verdict setting the sale aside, which we are not inclined to disturb, upon the case made, it becomes unnecessary to consider the assignments of error upon the charges applicable to the second position taken by complainant. Our judgment is:

1. The bill having charged that Mrs. Ferrill was induced to sell her land, by the representations of defectiveness in her title by Sims, her brother-in-law, and that he stood in a fiduciary relationship to her at the time, and that she would not have sold but for such representations, and he having based his defense, among other things, upon her willingness and anxiety to sell, independent of any representations made by him to her, it was competent for complainant to prove her

sayings to Threlkeld, for the purpose of showing her unwillingness to sell, just before her conversations with Sims upon the subject.

2. It was not error in the Court to refuse to compel counsel for complainant to strike out the marginal marks made by him on the answer, it not appearing that those marks conveyed any idea affecting the merits of the case.

3. The admissions made in the answer, though a sworn answer was waived, stand upon the same footing with any other admissions, and may be relied on by complainant as evidence of the fact admitted; the whole answer being before the jury, and the admissions being subject to such qualifications as may be gathered from other parts of the answer, but the jury are not bound to believe the qualifications.

4. A sale of land of a testator, or intestate by the executor or the administrator in the manner prescribed by law, where the estate is insolvent, divests the liens of judgments obtained in the lifetime of the testator or intestate, and the creditor must look to the proceeds in the hands of the representative of the estate.

5. Trust and confidence reposed in a brother-in-law by his widowed sister-in-law requires the utmost good faith and fair dealing in any contract of sale between them. A misrepresentation of the law by the brother-in-law to his sister-in-law, whereby she is led to believe her title to property held by her is invalid, and on this account she sells it to him, which sale is much to his advantage, vitiates the sale at her election, even though such misrepresentation was made in good faith. Code, 2594.

6. Where, under the foregoing relations of trust and confidence, a sale is effected between the parties during the war for Confederate money, which is to be paid in cash, and the brother-in-law applies a portion of the money to the extinguishment of a lien, supposed to rest upon the property without the widow's consent, but in accordance with what he alleges, and she denies to have been the bargain, pays the

widow a portion, and retains a large portion in his own hands, without her consent, and for which he does not clearly account, she is entitled to a decree setting aside the sale upon her accounting for the Confederate money actually received by her at a fair valuation.

Whether there was trust and confidence reposed by Mrs. Ferrill in Sims; whether, under such circumstances, he misrepresented to her the legal effect of the Prothro judgment upon her title, and whether she agreed that that judgment might be paid off with a portion of the $10,000, which Sims agreed to give her for the property, were questions for the jury. Their finding covers them and there is no ground for disturbing it. His agreement to pay cash, and his failure to do so, the money agreed to be paid being a rapidly depreciating currency, was alone, in all probability, a good ground for annulling the sale. So, at least, it has been intimated by this Court in *Smith vs. Bryan*, 34 Georgia, 64, in the body of the decision, not contained in the head notes.

7. There is evidence to sustain the verdict in this case, and we find no material error in the charge, or the refusals to charge, of the Court.

Judgment affirmed.

MARY A. MOSELY, administratrix, plaintiff in error, *vs.* WILLIAM HOGG, defendant in error.

(MONTGOMERY, Justice, did not preside in this case, having come upon the Bench since it was argued. The decision was reserved from July Term, 1871, to await the ruling of the Supreme Court of the United States, in the case of White *vs.* Hart, 13 Wallace, 646.)

The seventeenth section of the fifth Article of the Constitution of 1868, which declares that "No Court or officer shall have, nor shall the General Assembly give jurisdiction to try, or give judgment on, or enforce any debt, the consideration of which was a slave or slaves, or the hire thereof," is in violation of the tenth section of the first Article of the Constitution of the United States, and is therefore null and void.

Constitutional law. Slave debt. Before Judge HARVEY. Polk Superior Court. February Term, 1871.

For the facts of this case, see the decisions.

THOMPSON & TURNER; E. N. BROYLES, for plaintiff in error.

H. BLANCE, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant on a promissory note, dated 13th November, 1861.

The defendant pleaded to the action, and alleged in his plea that the note was given for the hire of a negro slave named George, belonging to one Newman, who was hired to work in a blacksmith shop, and that the consideration of the note was given for the services of said negro, and that since said note was given the collection of such claims has been declared to contravene the policy of the law; wherefore, he asks that said suit be dismissed.

The plaintiff demurred to the defendant's plea, on the ground that the seventeenth section of the fifth Article of the Constitution of this State, adopted in 1868, which denies jurisdiction to the Courts of this State of the plaintiff's demand is in violation of the tenth section of the first Article of the Constitution of the United States, and is void—which demurrer was overruled by the Court, and the plaintiff excepted. The plaintiff's counsel admitted that under the evidence offered at the trial, that the consideration of the note was for the hire of a slave. The defendant then moved the Court to dismiss the plaintiff's action, on the ground that the Court had no jurisdiction of the case, which motion was granted by the Court, and the plaintiff excepted.

The seventeenth section of the fifth Article of the Constitution of 1868 declares, that "no Court or officer shall have,

nor shall the General Assembly give jurisdiction or authority to try, or give judgment on, or enforce any debt, the consideration of which was a slave or slaves, or the hire thereof." By the tenth section of the first Article of the Constitution of the United States, it is declared, that "no State shall pass any law impairing the obligation of contracts." The seventeenth section of the fifth Article of the Constitution of 1868, denying to the Courts jurisdiction to enforce the collection of the plaintiff's debt, not only *impaired* the obligation of his contract but *annihilated* and *destroyed* it, because it denies to him any and all remedy to enforce that obligation against the defendant. The seventeenth section of the fifth Article of the Constitution of 1868, so far as it affects the obligation the plaintiff's contract in this case, denying to him any and all remedy to enforce it against the defendant, is in violation of the tenth section of the first Article of the Constitution of the United States, and is, therefore, *null and void.*

Let the judgment of the Court below be reversed. (See dissenting opinion of WARNER, Judge, in White *vs.* Hart, 39 Georgia Reports, 307.)

McCAY, Judge, concurring.

I concur in the judgment of refusal on the sole ground, that the Supreme Court of the United States having decided in the case of White *vs.* Hart, that the seventeenth section Article fifth of the Constitution of 1868 is void, this Court is bound to conform its judgment to the decision and judgment of the appellate tribunal having jurisdiction of the question.

THE SAVANNAH AND THUNDERBOLT RAILROAD COMPANY, plaintiff in error, *vs.* THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH, defendant in error.

1. The State has the same right of eminent domain over the streets and squares of Savannah, dedicated to the use of the inhabitants of the city, by Act of 1760, and those since laid out upon the common, dedicated by that Act to the same use, as it has over other territory of the State, and may lay an additional servitude upon such streets and squares, by granting to a corporation the right to run a street railway, whose cars are drawn by animal power, through them, without the consent of the Mayor and Aldermen of the city.
2. The Mayor and Aldermen of the city of Savannah have no such property in the streets and squares of the city, under the Act of 1760, or any Act amendatory thereof, as entitles them to pecuniary compensation for the additional servitude, so placed upon the streets and squares by the Legislature. Nor have they the right to an injunction restraining the construction of the railway for the benefit of the residents along such streets and squares. If such residents are damaged by the construction of the railway, they will be heard by the Courts upon a proper case made.

Injunction. Eminent domain. Municipal corporation. Before Judge SCHLEY. At Chambers. February 13th, 1872.

Defendant in error filed its bill against plaintiff in error, in which it was charged that on December 11th, 1871, an Act was passed by the General Assembly of Georgia, incorporating certain persons therein mentioned, under the name of The Savannah and Thunderbolt Railroad Company, with power to lay a railroad track through the length of Abercorn street, in the city of Savannah, beginning at its junction with Bay street, and to run cars drawn by animal power on said track, within the corporate limits of said city; that under said Act, which was passed without complainant's knowledge or consent, said company claims that it has the right and legal power to lay a railroad track through the public squares of said city, between the northern and southern termini of said Abercorn street; that said company claims that said squares are parts of Abercorn street; that, at a time beyond

the memory of any person now living, and at the original laying out of the town, Reynolds square and Oglethorpe square, with the exception, perhaps, of the areas skirting the northern and southern sides, and forming parts of public streets running east and west, were dedicated to public uses, and set apart for the comfort, health and convenience of the lot holders and inhabitants of said town, and of persons seeking business or pleasure there, exclusive of the right or claim, or pretense of right in or by any person whatsoever, to traverse said squares, in or with any cars, carriage or other vehicle; that with the possible exception aforesaid, no streets were ever intended to run through said squares; that such dedication and setting apart, good and valid in the origin, have been repeatedly recognized by all the departments of government of the State, with the acquiescence of complainant, and of all previous governments or guardians of Savannah; that for many years past, and as evidence of such dedication and setting apart, all the areas of said squares, not necessary for said skirting streets, have been enclosed and kept enclosed, except for ingress and egress by persons on foot; that all these things are true of Lafayette and Calhoun squares, except in so far as there is a difference or distinction growing out of the more recent dedication and setting apart of said last mentioned squares; that defendant has notified complainant of its claims, which claims complainant charges have no authority in law, and are beyond the power of the Legislature of Georgia, or of the corporation of the city of Savannah; that defendant failing to obtain complainant's permission to lay said track and run through said squares, has threatened and still threatens so to do without the permission of complainant; that the only remedy is by writ of injunction.

On January 13th, 1872, Judge Schley ordered that defendant show cause why an injunction should not issue in accordance with the prayer of the bill, and directed that his order should operate as an injunction until cause shown. On

January 26th, 1872, defendant showed for cause why an injunction should not issue, the Act of Incorporation heretofore alluded to, and which it is unnecessary further to set forth. On February 13th, 1872, Judge Schley decided said Act of Incorporation to be unconstitutional and void, and ordered an injunction to issue in accordance with the prayer of the bill, to which decision plaintiff in error excepts, and says that the Judge erred:

1st. In deciding said Act of the Legislature to be unconstitutional and void.

2d. In deciding that the Legislature had no power to grant to said Savannah and Thunderbolt Railroad Company the right to construct their railroad through Abercorn street and the squares intersecting it.

3d. In granting the injunction as prayed for.

HARTRIDGE & CHISOLM, for plaintiff in error. Judicial notice taken of the laws of Georgia and Ordinances of the city: 1 Greenleaf Ev., sec. 6; Code, sec. 3762; 16 Ga. R. Title to streets and squares in the city, with restrictions: Act of May 1st, 1760; R. M. Charlton, 349; 33 Ga. R., 614; Code, sec. 4759; 27 N. Y., 188. Tenure of realty limited by right of eminent domain: 6 How., 532; Code, secs. 2195, 2196. Legislature judge of exigencies requiring exercise of right of eminent domain: Code, sec. 2197; 21 N. Y., 595; 23 Pick., 396. Eminent domain exercised through corporate bodies, on just compensation: Code, secs. 2198, 2199. Legislature may control streets and squares of a city: 34 Barb., 494; 27 N. Y., 188, 192; 17 Ga. R., 60; 16 Pick., 104, 105. Legislature may change one kind of public use for another: 27 N. Y.; 16 Pick., 102, 105; 4 Cush., 70–72; 17 Ga., 60, 61. Providing a channel for commerce is a public use: Code, sec. 2196. Act could be passed without the assent of the corporation: 27 N. Y., 199, 213, 214; 10 How., 532, 538. Power of alienation limited by the State to an Act of the Legislature: 33 Ga., 614, 615. Restrictions by a former

Legislature would be void: 1 Redf. on R., 260; 17 Ga., 59, 60. Law is the same, whether point is made by the corporation or by the people: 38 Barb., 369. Limitation on right of eminent domain is confined to exclusive rights: Code, sec. 2199. Grant only imposes additional servitude: 23 Pick., 392. Property holder takes, subject to right of eminent domain: 17 Ga., 60; 6 How., 532; 9 Ga., 524; 25 Ga., 458. No prescription lies against the State: Code, sec. 2690. Act is constitutional: 6 How., 532; 10 How., 534.

A. W. HAMMOND & SON, for defendant. The title to the streets is, *prima facie*, in owners of adjoining lots: 33 Ga. R., 601. If not in them, then in the Mayor and Aldermen of Savannah, subject to specified terms, and cannot be taken without just compensation: 13 Min. R., 315; 16 N. Y. R., 97–109; 4 Cush. R., 63; 19 N. J. R., 386; 39 N. Y., 404; Cooley's Cons. Lim., 544, 553; S. C. R. R. vs. Steiner, decided at January Term, 1871. The Act makes no provision for paying or ascertaining compensation: 1 Ga. R., 524; 3 *Idem.*, 31; 9 *Idem.*, 37. *Quantum* of damages not material. County road altered, damages to abutting owners must be paid: Code, secs. 643, 2270.

MONTGOMERY, Judge.

The only question for the consideration of the Court in this case is, has the Legislature the power to grant to a street railway the right to run through the squares intersecting Abercorn street, in Savannah, without the consent of the corporation, and without compensation to the city? The Mayor and Aldermen of Savannah hold the title to the streets, squares, lanes, etc., in trust for the "accustomed use of" the inhabitants of the city, under the Act of May 1st, 1760, and the Acts amendatory thereof: 33 Ga., 614–616. "The corporation cannot alien or grant the public property, for purposes *different from the object of its original appropriation:*" *Ibid.*, 615. And yet we will find that the corpora-

tion has diverted the squares of the city from the purposes of their original appropriation. The original purpose to which the squares were appropriated can only be found, so far as authorities at my command have enabled me to ascertain, in the second volume of the Georgia Historical Collections, pages 252–3, in a paper entitled, "A True and Historical Narrative of the Colony of Georgia, in America, by Patrick Tailfee (Telfair?), M. D., Hugh Anderson, M. A., D. A. Douglass and others, landholders in Georgia," etc., first printed for the authors by P. Timothy, at Charleston, in the year 1741. There we find that "the plan of the town was beautifully laid out in wards, tithings and public squares, left at proper distances for markets and public buildings, the whole making an agreeable uniformity." Again: "A public mill for grinding corn was first erected at a considerable expense, in one square of the town; but, in about three years' time, without doing the least service, it fell to the ground. In another square of the town, a second was set up, at a far greater expense, but never finished; and is now erased and converted into a house for entertaining Indians, and other such like uses." These, then, were the uses to which the squares were put, eight years after the foundation of the town, and nineteen years before the Act of 1760. It is difficult to understand how the squares could have been used, either as markets or as mill-sites, without being traversed by vehicles of every description. And this must have been the "accustomed use," mentioned in the Act of 1760, unless the use had changed within the nineteen years preceding the Act, of which change I can find no record. When the squares were enclosed, and vehicles and horses excluded, some old ordinance of the city, not accessible to me, may show.

This brief historical retrospect shows that the original appropriation of the squares, at least, of those laid out at the foundation of the town, was not as parks, or of pleasure grounds; and therefore, if there is any peculiar sanctity to

be attached to dedications of that character (which is not conceded), the original squares of Savannah cannot claim the benefit of it. I, therefore, find that in point of fact the squares were dedicated precisely as were the streets. Indeed, having been diverted without authority of the Legislature from the original purposes of the dedication, the question might be raised as to whether the Legislature might not compel, if they chose so to do, a return of the use of the same squares to those purposes—that is, to their use as thoroughfares. The charter of the plaintiffs in error does this to the extent of the permission granted to run one class of vehicles through them. It is not seriously questioned that as to the streets the Legislature has not the right of eminent domain in them, which enables it to place an additional servitude upon them. The city of New York holds the title to the streets of that city, upon the same trusts and limitations that the city of Savannah holds the streets, squares, lanes and passages of that city, to-wit: for the use of the public, "and not as corporate property." "And the trust of the city being *publici juris*, it is under the unqualified control of the Legislature; and any appropriation of it to public use by legislative authority is not a taking of private property, so as to require compensation to the city to render it constitutional:" The People *et al. vs.* Kerr *et al.*, 27 N. Y. R., 188. "I cannot doubt that the power exists with the State Legislature, without the consent or license of the municipal corporations to so control the use of the public streets of the city as to authorize the construction of a railroad track therein, on which city passengers may be transported for hire:" *Ibid.*, page 214. But it is said that the dedication of the squares to the public was a contract in which both the public and the individual lot owners along the squares have acquired vested rights.

The reply is, first, "All contracts are made subject to the right of eminent domain. A contract is, therefore, not violated by the exercise of the right:" The West River

Bridge Company *vs.* Joseph Dix *et al.*, 6 Howard, S. C. R., 507. Especially is this true as to incorporations for public purposes: The Town of East Hartford *vs.* Hartford Bridge Company, 10 Howard, 511. "It is, therefore, clear that whatever in the nature of a contract could be considered to exist in such a case, by a grant to a town of some public privilege, there must be implied in it a condition that the power still remained, or was reserved in the Legislature to modify or discontinue the privilege in future, as the public interests might, from time to time, appear to require:" East Hartford *vs.* Hartford Bridge, 10 Howard, 536. The appropriation of property to one public use by the Legislature does not deprive it of putting an additional servitude thereon: Boston Water Power Company *vs.* Boston and Worcester Railroad Company, 23 Pick., 396–7; 1 Redfield on Railways, 260, note. Secondly, the Mayor and Aldermen of Savannah "cannot get an injunction to restrain the running of a railroad on the ground of injury to lot-owners along the line:" The People *vs.* Law, 34 Barb., 508. Again: "The laying of a railway upon the surface of a street, so that, except at the instant of the passing of a train, vehicles and horsemen and footmen may pass freely in and across the street," "does not materially interrupt the ordinary use of the street through which it is allowed to pass." "In that case the street remains, is open, free; in that case a new use is made of the street, without abridging its ancient use:" The Savannah, Albany and Gulf Railroad Company *vs.* Shields, 33 Ga., 616; Hamilton *vs.* The New York and Harlem Railroad Company, 9 Paige's Ch. R., 170. So that the *trust* interest, held by the Mayor and Aldermen of Savannah, is not damaged; and for injury to *private* interests, if there be any, the persons injured are the proper parties to complain.

Conceding, however, that the squares were originally dedicated as parks or pleasure grounds, rather than as "markets overt," as was then, and is, perhaps, now, the custom in many parts of England, where "fairs and markets" are held, still,

the power of the Legislature to lay the additional servitude is indisputable. The case of Wellington *et al.*, petitioners, was an application for a *mandamus* to compel county commissioners to lay out a highway through a public park, set aside as such by Act of the Legislature, with privilege only to foot passengers to pass through. The Court refused the *mandamus*, on the ground that the Act had taken away the power from the commissioners, but says, "this decision does not involve the sovereign right of eminent domain, or affect the power of the Legislature to appropriate this property to other public uses, as public exigences may arise:" 16 Pick., 105. Again, on page 104, the Court says, "considering the power of the Legislature (to appropriate the park to other public uses) undeniable, the question is, whether the Act (setting aside the property as a park) by its terms and provisions, does supersede the power of the commissioners to lay out a highway over this common," etc. Once more, on page 103: "It is manifest that, in cases of rare occurrence, as that of a railroad or other similar work, if property, could not be appropriated to public use by the Legislature, it could not be done at all, because there is no provision by law for its being done in any other way. The right of the sovereign power of the State is incontestible. No other provision being made for its exercise, it is, therefore, necessarily vested in the Legislature. Such is the present case, that of a public park, promenade and place for military parade." See, also, 17 Georgia, 60 and 61. Our judgment, therefore, is:

1. The State has the same right of eminent domain over the streets and squares of Savannah, dedicated to the use of the inhabitants of the city, by Act of 1760, and those since laid out upon the common, dedicated by that Act to the same use, as it has over other territory of the State, and may lay an additional servitude upon such streets and squares by granting to a corporation the right to run a street railway, whose cars are drawn by animal power through them, without the consent of the Mayor and Aldermen of the city.

2. The Mayor and Aldermen of the city of Savannah have no such property in the streets and squares of the city, under the Act of 1760, or any Act amendatory thereof, as entitles them to pecuniary compensation for the additional servitude, so placed upon the streets and squares by the Legislature. Nor have they the right to an injunction restraining the construction of the railway for the benefit of the residents along such streets and squares. If such residents are damaged by the construction of the railway, they will be heard by the Courts, upon a proper case made.

3. The Act of December 11th, 1871, authorizes the Savannah and Thunderbolt Company to run their railway through the squares, intersecting Abercorn street.

Judgment reversed.

T. N. W. HORN and J. R. G. HORN, plaintiffs in error, *vs.* MARY E. BIRD, defendant in error.

(McCAY, Justice, did not preside in this case, having been of counsel.)

When a judgment was rendered against the defendants, as administrators, and the Clerk issued an execution thereon, in favor of the plaintiff, commanding the sheriff to make the money due on the judgment of the goods and chattels, lands and tenements of the intestate, in the hands of the administrators, and in default thereof, of the goods and chattels, lands and tenements of the administrators, in their individual capacity:

Held, That the execution so issued was illegal, on the statement of facts disclosed by the record:

Held, also, That the affidavit of illegality was amendable on the motion made therefor by the defendant.

Illegality. Award. Amendment. Before Judge CLARKE. Sumter Superior Court. October Term, 1871.

The questions in this case arose upon an affidavit of illegality filed to an execution in favor of Mary E. Bird against

T. N. W. Horn and J. R. G. Horn, issued from the Superior Court of Sumter county, on March 3d, 1871, for the sum of $1,626.60 principal, besides interest in costs. The execution was directed to the proper officers of the State, and commanded them to cause to be made the aforesaid sum of money from "the goods and chattels, lands and tenements of John E. J. Horn, in the lands of Joel R. G. Horn and Thomas N. W. Horn, administrator, and in default thereof, of the goods and chattels, lands and tenements of said Joel and Thomas." This execution was issued upon an award in a certain equity cause pending in Sumter Superior Court, the only material portion of which is as follows: "We further award that the said Joel R. G. Horn and Thomas N. W. Horn, as administrators of the said John E. J. Horn, pay to the said Mary E. Bird the sum of $1,626.60, the amount due her as her share of the rents and profits, and interest thereon as above stated, after deducting the said amount of $444.00." The *fi. fa.* was levied upon the individual property of J. R. G. and T. N. W. Horn. The plaintiffs in error filed an affidavit of illegality, setting up the following grounds:

1st. That said execution, if legal, could not have been levied upon deponent's individual property until the property of the estate of J. E. J. Horn had been exhausted by levy and sale, which has not been done.

2d. That said execution has been levied on deponent's individual property, when the judgment, upon which it purports to have been founded, is simply a judgment generally against the estate of J. E. J. Horn.

3. That deponents, to the best of their knowledge and belief, and as they are advised, have paid off and discharged the interest of plaintiff in the judgment on which said execution is founded.

Defendant in error demurred to said grounds of illegality. Whilst the Court was delivering its judgment upon the demurrer, plaintiffs in error moved the Court "to allow them to make the following amendment to the affidavit of illegality,

the facts of which amendment deponents did not know of at the time the original affidavit of illegality was filed, for the reason that the receipts taken from plaintiff's attorney, showing the payments which had been made on said *fi. fa.* were not before defendants, but were at the time inaccessible. That defendants paid on said *fi. fa.* the sum of $1,200, on or about February 25th, 1870, and the balance due thereon they paid on or about December 6th, 1870." The Court overruled the motion to amend and sustained the demurrer, whereupon plaintiffs in error excepted.

HAWKINS & GUERRY, for plaintiffs in error.

W. A. HAWKINS; A. R. BROWN, represented by N. J. HAMMOND, for defendant.

WARNER, Chief Justice.

In this case there was an award made by arbitrators, in which they awarded that J. R. G. Horn and T. N. W. Horn, as administrators of J. E. J. Horn, do pay to Mary E. Bird the sum of $1,626.60, as the amount due her as her share of rents and profits, etc. This award was made the judgment of the Superior Court. An execution was issued by the Clerk in favor of Mary E. Bird, commanding the sheriff to make the money due on said judgment, of the goods and chattels, lands and tenements of J. E. J. Horn, in the hands of J. R. G. Horn and T. N. W. Horn, administrators, and in default thereof, of the goods and chattels, lands and tenements of the said Joel and Thomas Horn. The sheriff levied the execution on certain described land as the property of J. R. G. Horn and T. N. W. Horn. The defendants filed an affidavit of illegality to the execution, on the ground that the judgment was rendered against them as administrators, and should have been levied on the property of their *intestate*, and not upon their *individual* property, and that to the best of their knowledge and belief, the plaintiff's interest in the judgment had been paid off and discharged. The plaintiff

demurred to the defendant's affidavit of illegality, which demurrer was sustained by the Court, and the defendants excepted. The defendants made a motion to amend their affidavit of illegality which was refused by the Court, and the defendant excepted. In our judgment, the Court below erred in sustaining the demurrer to the defendant's affidavit of illegality on the statement of facts contained in the record: Code, 3515, 3581. The Court also erred in refusing the amendment offered by the defendant's to their affidavit of illegality: Code, 3450, 3429; 26 Georgia Reports, 617.

Let the judgment of the Court below be reversed.

THE SOUTHWESTERN RAILROAD COMPANY and THE CITY OF ALBANY, plaintiffs in error, *vs.* JOHN SCREVEN, Receiver, defendant in error.

When the Brunswick and Albany Railroad had, at great expense, graded a street of the city of Albany of sufficient width for laying therein two railroad tracks, on an assurance from the City Surveyor that, should the Southwestern Railroad desire also to use the street, the city would require the Southwestern Railroad to pay to the Brunswick and Albany Railroad half the expense of the said grading, etc., and the City Council afterwards, in view and furtherance of the said assurance, granted to the Southwestern Railroad the right to use said street, provided it paid to the Brunswick and Albany Railroad the half of said expense, and the Brunswick and Albany Railroad laid their track so as to conform to this grant of the city to the Southwestern Railroad:

Held, That equity will restrain the city of Albany from revoking the conditions of their grant to the Southwestern Railroad and directing the money to be paid to the city, and will also restrain the Southwestern Railroad from paying the money to the city.

Injunction. Receiver. Before Judge COLE. At Chambers. Bibb county. March 2d, 1872.

John Screven, as Receiver of the Brunswick and Albany Railroad, presented his bill for injunction to Judge Cole, containing the following allegations: That the Brunswick and

Albany Railroad, having finished its line of track from the seaboard to the city of Albany, and being desirous of passing through said city on its way westward, entered into negotiations with said city, the result of which was a contract to the effect that said city would appoint one J. A. Maxwell its surveyor and engineer, and that he should draw up certain specifications of the grading, embankment and other work, in accordance with the views of said city, and if the Brunswick and Albany Railroad would comply therewith, the said road should have the right of way through said city by way of North-street; that said Railroad complied with the onerous and expensive conditions imposed on it by said city; that in the negotiations with said city it was expected that the Southwestern Railroad would desire to pass through said North-street when its line was completed to Albany, and that it was understood and agreed that, before the right of way should be given by said city to said Southwestern Railroad, it should be required to pay to the Brunswick and Albany Railroad one-half of the expense incurred in excavating, grading, etc., on North-street; that the Brunswick and Albany Railroad was about to locate its track in the centre of said street when it was appealed to by the Southwestern Railroad to place said track a proper distance south of the centre, in order to leave room on the north side for its track; that the Brunswick and Albany Railroad complied with this request; that the Southwestern Railroad then applied to the city of Albany for permission to run through said North-street, which was granted, conditioned upon its paying to the Brunswick and Albany Railroad one-half of the expense incurred in excavating and grading said street, as was agreed and understood between the city of Albany and the Brunswick and Albany Railroad; that the Southwestern Railroad is now laying its track through said North-street; that said city of Albany, in violation of complainant's rights, has recently passed a resolution requiring said Southwestern Railroad to pay into the city treasury the half of the expense of the

Brunswick and Albany Railroad in excavating, grading, etc., of North-street; that the Southwestern Railroad is colluding with the city of Albany, hoping to settle with said city for an inconsiderable sum, and in violation and fraud of the rights of complainant. Prayer for injunction, restraining the Southwestern Railroad from paying over said fund to the city of Albany, and the city of Albany from receiving it. There was no allegation in the bill that the Southwestern Railroad or the city of Albany was insolvent.

After notice and argument, Judge Cole, on March 2d, 1872, sanctioned the bill and ordered the injunction to issue, and plaintiffs in error excepted.

SMITH & JONES; CLARK & GOSS; VASON & DAVIS, for plaintiffs in error.

NISBETS & JACKSON; A. W. HAMMOND & SON, for defendant.

McCAY, Judge.

It can hardly be disputed that this attempt of the city of Albany to alter its contract with the Brunswick and Albany Railroad is a wrong to that company. Whether the contract was one which could have been enforced as a contract, is not the question. After the Brunswick and Albany Road had acted on it, done the work under the eye of the city, it is too late for the city to say, our contract does not bind us.

The only question of any doubt is the right to the injunction. Were the Brunswick and Albany Railroad a solvent road, going on in its usual business, we might hesitate to infere. But the Brunswick and Albany Railroad is in the hands of a Court of equity, with all its rights; one of those rights is the right to the value of this work, which the Southwestern Road is to pay. We think its payment to the city of Albany would complicate the matter. In strict law they are the owners of the street, but they have transferred the

equitable right to this money to the Brunswick and Albany Railroad. It is an equitable fund—a Court of equity has a present possession of all its interests, and we think its jurisdiction is complete to stop the fund where it is.

Judgment affirmed.

JAMES P. BOWERS *et al.*, plaintiffs in error, *vs.* ROBERT J. GRIMES, administrator, *et al.*, defendants in error.

(WARNER, Chief Justice, was prevented by providential cause from presiding in this case.)

While an administrator *de bonis non* has power to call upon the representatives of his deceased predecessor to account with him, the heirs-at-law and creditors have also the same right upon a proper case made, but if the administrator *de bonis non* fails so to do, the heirs and creditors of the first intestate cannot sue the administrator *de bonis non* for this failure, unless they show that he knew of the *devastavit*, and was guilty of some special neglect, not equally chargeable upon themselves.

Administrator *de bonis non*. *Devastavit*. Before Judge HARRELL. Stewart Superior Court. October Term, 1871.

James P. Bowers and the other heirs and distributees of Needham Johnson, deceased, filed their bill against Robert J. Grimes, as administrator *de bonis non* of said Johnson and his securities, and charged that one John Grimes was appointed administrator upon said estate; that said John Grimes died solvent, and having said estate in his hands; that Robert J. Grimes was appointed administrator *de bonis non;* that said Robert J. had failed to collect said estate; prayer that he might be required to account. Robert J. Grimes answered said bill, admitting the facts alleged, setting forth the amount of said estate, but denying that he had ever received any part thereof. The case rested upon the bill and answer. Defendants moved the Court to non-suit complainants upon the following grounds, to-wit:

1st. Because the proof failed to show that the defendant, Robert J. Grimes, as administrator *de bonis non*, had received the estate of Needham Johnson, deceased, into his hands.

2d. Because an administrator *de bonis non* could not call to account the representatives of the deceased administrator, and is not liable to the complainants for his failure to do so.

The Court sustained the motion and dismissed the bill, whereupon complainants excepted and assign said ruling as error.

HERBERT FIELDER, for plaintiffs in error.

E. H. BEALL; J. S. WIMBERLY, for defendants.

McCAY, Judge.

By the common law an administrator *de bonis non* could only call the previous administrator or executor or their heirs to turn over all unadministered assets: 1 Kelly, 81. But our Act of 1845, Cobb, 335, *authorized* the administrator *de bonis non* to call the previous administrator to account. This Act did not, however, require him to account. This Court, in Shorter *et al. vs.* Hargroves, 11 Georgia, 659, decided that this right in the administrator *de bonis non* was not exclusive, but that the persons interested in the estate might sue the estate of the former administrator directly. The Code does not seem to contain any express authority to the administrator *de bonis non* to compel an account. It is, however, implied by the language of several sections: See sections 2473, 2474, 2475, 2476. We think, therefore, the Act of 1845 is not inconsistent with the Code and is still of force. Section 2476 of the Code authorizes the heirs and creditors to sue the removed administrator, and there is nothing in the Code to alter the old law as to this right against the representatives of a deceased administrator. Without doubt, this right existed at common law, indeed nobody else had it, since the administrator *de bonis non* had no such right. It results

that our law now is as it was before the Code on this subject. The creditors and the heirs may, as they always might, call on the previous administrator or his representatives for an account and settlement. The administrator *de bonis non* may also do it. But we do not think it follows as a matter of course that he must do it. When there is anything in the nature of the estate, or the character of the parties, which specially casts this duty on the administrator *de bonis non*, he is liable for this neglect. But it must be a case of *neglect*. Certainly, it must appear that he knew of the *devastavit*, and that he was guilty of some positive neglect—some negligence not equally chargeable on the creditors themselves or upon the heirs or their guardians. Each case must stand on its own facts.

Judgment affirmed.

WILLIAM DOUGHERTY, relator, *vs.* ROBERT D. HARVEY, Judge of the Rome Circuit.

Application for *mandamus*. Writ of error to dissolution of injunction. Before the Supreme Court of Georgia. January Term, 1872.

For the facts of this case, see the decision.

WILLIAM DOUGHERTY, for the application.

MCCAY, Judge.

Mr. Dougherty had filed an affidavit and made a motion to reduce the amount due on a judgment held by Mr. Yancey against him, under the Act of 1868. Pending the motion, he obtained an injunction against any proceedings, to sell under the execution, alleging that the sheriff was about to proceed in defiance of his affidavit. The bill also set up some

additional equities not covered by the affidavit. On the calling of the motion to reduce the judgment, the Court dismissed it on demurrer, and subsequently, during the term, on motion, dissolved the injunction. Whereupon, Mr. Dougherty filed his bill of exceptions to the judgment dismissing the motion, and to the order dissolving the injunction. Judge Harvey, while perfectly willing to sign and certify the bill of exceptions to the judgment dismissing the motion, declined to sign and certify that part of the bill presented which objected to and assigned error upon his judgment dissolving the injunction, on the ground that the bill of exceptions had not been presented to him within fifteen days after the judgment dissolving the injunction was rendered, and Mr. Dougherty files his petition to this Court for a *mandamus*.

The Judge of the Rome Circuit, having in his certificate attached to the original bill of exceptions and presented with the petition for *mandamus* to this Court, stated as his reason for failing to certify and sign the same, that he had previously, and under the Act of October 29th, 1870, signed and certified a bill of exceptions to his judgment, dissolving the injunction, and he having also, in said certificate, indicated that his only objection to the signing and certifying, as asked for, was the question of law as to whether a bill of exceptions to the judgment dissolving an injunction *can* be presented later than fifteen days after the day of the judgment, this Court is of opinion that a *mandamus nisi* is not necessary in this case.

And, as from the record before us, and the bill of exceptions, this Court is not clear that the dissolution complained of was not a final disposition of the cause, so far as the injunction is concerned, that the motion to dismiss the illegality, and the order dissolving the injunction are so connected that they in fact form but one proceeding; it is the opinion of this Court, and we so order, that Judge Harvey sign and certify the bill of exceptions, as asked for, that the parties may be heard on

the questions made therein, as claimed by the plaintiff in error, before this Court; *provided*, that nothing in this order shall be taken to bar the defendants in error from making before this Court on the hearing such questions in the premises, whether growing out of the record or out of the previous bill of exceptions, alluded to by Judge Harvey, in his certificate, as they might have done, had this order and direction not have been made.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Georgia,

AT ATLANTA,

JULY TERM, 1872.

PRESENT—HIRAM WARNER, CHIEF JUSTICE.
H. K. McCAY, } JUDGES.
W. W. MONTGOMERY, }

JAMES W. BURNSIDE, plaintiff in error, *vs.* BIRD TERRY *et al.*, defendants in error.

Where an instrument recites that B. held judgments against F., amounting to $3,000, and that F. had obtained the benefit of the homestead law upon his realty without objection from B., upon the following agreement: That if F. did not pay the money due upon the judgments on or before January 1st, 1871, then lot of land number forty, valued at $1,000, is to be the right and property of B., and said judgments are to be considered satisfied; in consideration of which, F. and his wife, L., conveyed the lot of land to B. in fee simple, and declared that the instrument was a conditional deed and not a mortgage, and was to become absolute upon the non-payment of the sum of money due on said judgments at the time specified, and that B. should have the right to enter and take possession at the expiration of the time, said instrument is a deed conveying the land upon a condition subsequent, and not a mortgage. (R.)

The approval of the Ordinary to the alienation of homestead property is required for the protection of the wife and children; and this is not

only a proceeding before the Ordinary, but is an important function which he is required to perform in the exercise of his judgment as a judicial officer, and he ought to be clearly satisfied in all cases that the wife's consent is freely and voluntarily given, and that the sale will be for the benefit of the wife and children. (R.)

A deed to property covered by a homestead, approved by an Ordinary who was related to the grantee within the fourth degree of consanguinity, is void. (R.)

Conditional deed or mortgage. Relationship of Ordinary. Separate estate. Homestead. Before Judge DAVIS. Hall Superior Court. March Term, 1872.

James W. Burnside brought complaint for a certain tract of land situate in the county of Hall, known by number forty, in the tenth district of said county, against Bird Terry, Bowling W. Field and his wife, Levada Field. Defendants pleaded the general issue, and also that the title to said land was in Bowling W. Field and his said wife.

Upon the trial, plaintiff introduced the following evidence:

"GEORGIA—LUMPKIN COUNTY:

"Whereas, James W. Burnside, of said county and State, holds in his own right divers judgments and *fi. fas.* from the Superior Courts and Justice Courts of said county against Bowling W. Field, of the same, amounting in the aggregate to the sum of $3,000, and the said Field has claimed and obtained the benefit of the homestead law upon a considerable estate of real property, to which the said Burnside filed no objections, upon the following agreement: That if the said Bowling W. Field does not pay or cause to be fully paid off said money due on said *fi. fas.* on or before the first day of January, in the year of our Lord (1871) eighteen hundred and seventy-one, then the fraction or lot of land number (40) forty, in the (10th) tenth district, Hall county, Georgia, known as the "Field's fraction," on the Chestatee river, valued at the sum of $1,000, is the right and property of the said James, his heirs or assigns forever in fee simple, and the said *fi. fas.* and judgments aforesaid are to be held and

considered in law and equity fully paid off and satisfied as to the said Field, his heirs and representatives. Now, in consideration of the premises, the said Bowling W. Field and his wife, Levada Field, have and do by these presents bargain, sell and convey and confirm said lot of land, with all its rights, members and appurtenances unto him, the said James W. Burnside, his heirs and assigns forever in fee simple, the right and title whereof the said Bowling W. Field, his said wife, their heirs, executors and administrators will warrant and defend the right and title against themselves, their heirs and assigns, and the claims of all other persons whatever. This is a conditional deed and not a mortgage, and becomes absolute upon the non-payment of the sum of money due on said *fi. fas.* and judgments at the time specified, and the said James W. Burnside has the right to enter and take possession of said lot of land at the expiration of the time.

"In testimony whereof, we have each freely and voluntarily hereunto set our hands and seals, this the 30th day of April, 1869.

(Signed) "BOWLING W. FIELD, [L.S.]

"LEVADA her ⋈ mark. FIELD, [L.S.]

"Signed, sealed and delivered in presence of:

"B. F. SITTON,

"McDUFFIE R. MOORE, J. P."

"GEORGIA—LUMPKIN COUNTY:

"Upon hearing the foregoing, and considering the interest of all parties, it is hereby ordered and adjudged that said deed of conveyance from Bowling W. Field and his wife, Levada Field, to James W. Burnside, be hereby approved and delivered, according to the statute in such cases made and provided.

"Given under my hand and seal of office this 30th day of April, 1869. W. A. BURNSIDE, *Ordinary.*"

Samuel Stephens testified, that he believed the rent of the property to be worth from ninety to one hundred and fifty bushels of corn; corn was worth, in 1871, sixty cents per bushel. Bird Terry was the tenant in possession. Was present when a *fi. fa.* was levied on the property as belonging to Field a short time before the same was set off as a homestead; the rent was worth about $90, in 1871; the *fi. fa.* was for about $8,000.

Defendants admitted the land to be in Lumpkin county, and that they had possession. Plaintiff closed.

Defendants introduced the following evidence: An exemplification from the records of the Superior Court of Lumpkin county, showing that said land, together with other property, had been set apart as a homestead to Bowling W. Field, on April 24th, 1869.

The depositions of McDuffie R. Moore are as follows: The official signature to the deed of his name is genuine; was in his office, in Dahlonega, when he signed the deed as subscribing witness; when he signed the deed, Bowling W. Field and Benjamin F. Sitton were present; Mrs. Levada Field was not present; to the best of his recollection, Levada Field's name was signed to said deed at the time it was presented to witness; the deed is in the handwriting of Weir Boyd, Esq.; B. F. Sitton acknowledged his signature before witness; Bowling W. Field's name was signed before the deed was presented to witness; W. A. Burnside is the brother of James W. Burnside; since witness attested said deed, Mrs. Levada Field has acknowledged her signature; B. W. Field told witness, at the time of the presentation of the deed, that it was his wife's signature; the signatures of Bowling W. Field and of B. F. Sitton are genuine; witness has heard Mrs. Levada Field say that "she signed the deed; that her husband was in debt, and that she was willing to do everything she could to help him out, and that they told her it would be the best she could do."

Mrs. Levada Field testified as follows: The morning

after B. F. Sitton surveyed off the homestead in Lumpkin, her husband asked witness to sign that paper, (the deed;) witness said she did not wish to sign any paper, and asked her husband and B. F. Sitton if they could not arrange matters without her. Mr. Sitton said to witness, "that it was the best she could do; that it might be carried to Court and ruin her; it might get into the big Court and she lose her home." Witness then signed the paper by taking the end of the pen which Mr. Sitton held; the paper was not read over in her hearing; did not hear it read after she made her mark; witness' husband said nothing more after asking her to sign the paper; Mr. Sitton did all the talking; witness never went before Mr. Burnside, the Ordinary, for him to approve the deed; never saw the deed afterwards.

Robert A. Quillian testified, that James W. Burnside, plaintiff, and William A. Burnside, Ordinary, are brothers. Defendants closed.

Plaintiff in rebuttal read the depositions of B. F. Sitton, as follows: Witness saw Bowling W. Field and Levada Field sign the deed, and signed it himself as a subscribing witness; the deed was read to Levada Field before she signed; she hesitated some time, but finally, voluntarily and without compulsion, signed it; B. W. Field, Levada Field, their son, John Field, and witness, were all who were present. At the time of the signing, it was agreed that Bowling W. Field, Levada Field and witness should acknowledge their signatures before a Justice of the Peace; Bowling W. Field, M. R. Moore, Justice of the Peace, and witness were all that were present when the Justice of the Peace attested the deed. Bowling W. Field said, "that signature was made by his wife, Levada Field." Witness went to lay off the homestead the day before the deed was signed; Bowling W. Field related to him the contract between him (Field) and James W. Burnside; the deed was signed by B. W. and Levada Field before the homestead was granted; the deed was signed at the residence of B. W. Field, and not in Dahlonega; W. A.

Burnside, Ordinary, was the brother of James W. Burnside.

Plaintiff introduced the following paper:

"Mr. BIRD TERRY: You will please deliver possession of lot known as the 'Field fraction,' to James W. Burnside, on the 1st day of January, 1871.

(Signed) "BOWLING W. FIELD.

"Dahlonega, Ga., Dec. 19th, 1870."

Under the charge of the Court, the jury returned a verdict for the plaintiff for the premises in dispute, with $50 for rent. Whereupon, defendants moved for a new trial, upon the following, among other grounds:

1st. Because the execution of the deed from Bowling W. Field and Levada Field to James W. Burnside was attested by but one witness at the signing by Levada Field, and was, therefore, invalid.

2d. Because William A. Burnside, Ordinary of Lumpkin county, was a brother of the plaintiff, and related to said plaintiff within the fourth degree of consanguinity, and said deed was submitted to said W. A. Burnside, as Ordinary of said county, and was passed upon and approved by said Ordinary, without the consent of the said Bowling W. Field and Levada Field.

3d. Because the approval of said deed by said Ordinary was null and void; he, the said W. A. Burnside, being incompetent on account of relationship to act upon or approve said deed, without the consent of B. W. and Levada Field.

4th. Because said deed is only a mortgage and passed no title to the premises therein conveyed.

5th. Because the consideration of said deed, as therein set forth, was illegal and against public policy.

6th. Because the Court, after correctly charging the jury that, "No Ordinary can sit in any cause or proceeding in which he is related to either party within the fourth degree of consanguinity or affinity," and further, that "if an Ordinary give a judgment, or does a judicial act which the law

does not allow him to do, such judgment or act is void and of no effect;" erred in charging as follows: "But when there is no litigation, I think it will do, and the judgment or act of the Ordinary will be valid. Determine from the evidence whether there was any litigation before the Ordinary."

The Court sustained the motion for a new trial, and plaintiff in error excepted, and assigns said ruling as error.

WIER BOYD; R. A. QUILLIAN, for plaintiff in error, cited Code, sections 2713, 2714, 2715; 9 Ga. R., 151; 32 *Idem*, 592; 40 Ga. R., 44; 2 Parsons on Contracts, 500. As to execution of deed: 16 Ga. R., 424; 17 *Idem*, 295; 22 *Idem*, 415; 100 Mass., 101; Code, section 2651. One creditor can prefer another: Code, section 1943.

GEORGE D. RICE; J. N. DORSEY, for defendants, cited Deed or Mortgage: 15 Ga. R., 558; 1 Powell on Mort., 4; 2 Johns Ch. R., 189; 15 *Idem*, 555; Code, section 1947; 9 Ga., 151; 1 *Ibid.*, 193; Code, section 1944. The consideration of the deed is against public policy: 2 Johns R., 386; 12 *Ibid.*, 305; 19 *Ibid.*, 311. The deed was a fraud on the creditors of B. W. Field: Harrison *vs.* Hatcher, decided 27th February, 1872: 41 Ga., 315; 16 *Ibid.*, 416. The homestead was not legally conveyed. The execution of this instrument, whether deed or mortgage, was not in conformity to law: Code, sections 2643, 1945. The Ordinary being related to one of the parties to the contract, the approval was void.

WARNER, Chief Justice.

This was an action of ejectment, brought by the plaintiff against the defendants to recover the possession of lot of land number forty, in the tenth district of Hall county. On the trial of the case, the jury found a verdict for the plaintiff. A motion was made for a new trial, on the several grounds specified in the record. The Court granted the new trial, whereupon the plaintiff excepted. The plaintiff claimed a title

to the land, under a deed made by the defendants, on the 30th day of April, 1869, to him, as set forth in the record; and one of the questions made on the motion for a new trial was, whether this deed, according to its legal effect, was a conditional deed, conveying a title to the land, or a mortgage. A mortgage in this State is only a security for a debt, and passes no title. No particular form is necessary to constitute a mortgage, but it must clearly indicate *the creation of a lien*, specify the debt to secure which it is given, and the property upon which it is to take effect: Code, 1944, 1945. A contract may be absolute or conditional. The classification of any contract must depend upon a rational interpretation of *the intention* of the parties: Code, 2679. It is recited in the deed, that Burnside, the plaintiff, held in his own right judgments against Field, one of the defendants, amounting to the sum of $3,000, and that Field had obtained the benefit of the homestead law upon his real property, to which Burnside filed no objections, upon the following agreement: that, if Field did not pay the money due on the judgments on or before the 1st day of January, 1871, then the lot of land (number forty, in the tenth district, valued at $1,000) is to be the right and property of said Burnside, his heirs and assigns forever, in fee simple, and the said judgments to be considered paid off and satisfied. In consideration of this agreement, Field and his wife, Levada, conveyed the lot of land to Burnside, in fee simple, and declared that it was a conditional deed, and not a mortgage, and becomes absolute upon the non-payment of the sum of money due on said judgments at the time specified, and that Burnside has the right to enter and take possession of said lot of land at the expiration of the time. The agreement between the parties was, that the judgments held by Burnside, amounting to $3,000, should be paid off and discharged by conveying the lot of land worth $1,000; and if the $3,000 was not paid by the 1st of January, 1871, the land belonged to Burnside, and the debt of $3,000 was paid off and

extinguished. Such was the contract and intention of the parties, as manifested by the deed and the recitals therein. The $3,000 was not paid by Field by the time stipulated, and the result was, by the terms of the deed, that the land became the property of Burnside; and Fields' debt, due to Burnside, of $3,000, was paid off and extinguished by the conveyance of the lot of land worth $1,000. In our judgment, this was a deed conveying the land upon a condition subsequent, and not a mortgage, according to the declared intention of the parties: Code, 2268–2273. Whether this agreement between Field and Burnside operated as a fraud upon the other creditors of Field, we express no opinion, as they nor the character of their claims are not now before us.

Another ground of error assigned is, that the deed of Field and his wife to Burnside for the lot of land in controversy was approved by W. A. Burnside, the Ordinary, who was the brother of James W. Burnside, the grantee in the deed, that he was incompetent to do so on account of his relationship to one of the parties, and that Mrs. Field was not present at the time of such approval by the Ordinary. The 193d section of the Code declares, "that no Judge, or Justices of any Court, no Ordinary, Justice of the Peace, nor presiding officer of any inferior judicature, or commission, can sit in any cause or *proceeding*, in which he is pecuniarily interested, or related to either party within the fourth degree of consanguinity or affinity." The property set apart under the Homestead Act is declared to be for the use of the wife or widow and children, during her life or widowhood, and at her death or marriage to be equally divided between the children of her former husband then living: see twelfth section, Act of 1868. The wife and children are the principal beneficiaries under the Homestead Act. The homestead property, set apart as such, cannot be alienated by the husband, but may be sold by him and his wife, *jointly*, with the approval of the Ordinary. The approval of the Ordinary is required for the protection of the wife and children; and

this is not only a *proceeding* before the Ordinary, but is an important function, which he is required to perform, in the exercise of his judgment as a judicial officer, and he ought to be clearly satisfied in all cases that the wife's consent is *freely* and *voluntarily* given, and that the sale will be for the benefit of the wife and children. Under the provisions of our Code, the wife cannot bind her separate estate by a contract to pay her husbands debts, nor by a sale of her separate estate to a creditor of her husband, in extinguishment of his debts: Code, 1773. The same reasons would seem to be applicable to the sale of the homestead in extinguishment of the husband's debts. In this case, the wife joined with the husband in selling a part of the homestead in extinguishment of the judgment debts of her husband, and if the homestead is to be held good as against the preëxisting debts of the husband, the Ordinary should not have approved the sale of the land for that purpose. The Ordinary who approved the sale was the brother of the party to whom the sale was made, as appears from the evidence in the record, the wife not being present at the time of the approval and consenting thereto. In our judgment, the deed was invalid because it was approved by the Ordinary who was related to one of the parties to it, within the degree of consanguinity prohibited by the Code, and that the new trial should have been granted on that ground.

Let the judgment of the Court below, granting a new trial, be affirmed.

COLQUITT & BAGGS, plaintiffs in error, *vs.* HARRIET M. TARVER, defendant in error.

Where property has been mortgaged, which is subject to the support of the mother of the mortgagors during her natural life, and proceedings are instituted to foreclose by the mortgagees, there is no good legal or equitable ground why the mortgages should not be foreclosed, as between the mortgagors and mortgagees, as such proceedings will not in any manner affect the right of the mother to her support out of the mortgaged property, provided the same is not sold under the judgment of foreclosure. (R.)

Where the first clause of a will contains the following provision: "First, my wife is to have the use of the house, furniture, carriages, horses, and everything necessary for her comfortable support, together with an ample and sufficient support out of and from said plantation, durher natural life or widowhood. But, should she marry again, then, in that event, she is to have the following negroes only, to-wit: Phil and his wife, Kittie, and all their children, Eliza, Bella, and her children, for and during her natural life; and at her death the said negroes are to be equally divided between my children by my said wife—these negroes to be all and everything my wife is to have out of my estate, if she marries again." And the codicil to said will the following provision: "First, I revoke and annul so much of the first item of my will as gives a life-estate to my wife, Harriet, in and to the negroes Phil and his wife, Kittie, and their children and increase, Eliza and Bella, and in addition to those negroes, I give her Rosa, one of the children of Susan; and I give my wife said negroes and their increase, forever in fee:"

Held, That the codicil does not adeem or revoke the first clause in the will which charges the estate with the support of testator's widow during her natural life or widowhood. (R.)

The record of the probate of the will was notice to the mortgagees that the property specified therein was charged with the support of testator' widow, but would not be notice as to other property purchased since the testator's death with the trust funds arising from the sale of the encumbered property. (R.)

Injunction. Mortgage. Construction of will. Notice. Before Judge COLE. Twiggs County. At Chambers. July 26th, 1872.

Harriet M. Tarver filed her bill containing substantially the following allegations: That she is the widow of Hart-

well H. Tarver, who died on November 19th, 1851, leaving an estate of lands, negroes and personalty of the value of $500,000; that by the first item of her said husband's will, the use of the family residence, carriages, horses and everything necessary to her comfortable support, was given to her during her natural life or widowhood, and all the lands mentioned in said item were charged first with her support; that it was the purpose of her said husband by said will to provide her a liberal support, his estate being amply sufficient for that purpose, and to enable him, moreover, to make such provision for his children and other legatees as he desired; that complainant, since the death of her said husband, has devoted herself to her children and their interests; that she has given general attention to the affairs of the plantation; that from the time of her said husband's death to the emancipation of the slaves, she cultivated some twenty-five or thirty acres of ground belonging to said estate with negroes owned by her, from which she derived a yearly income of from $200 to $300; that, before the late war, she received annually from the estate about $1,000, a portion of which was spent in the support and maintenance of her two minor children; that during the late war her yearly allowance from said estate did not exceed $300, and since said war she has received a yearly allowance of about $400; that complainant does not regard these amounts as constituting a liberal support, as contemplated by her said husband's will; that the personal attention and services rendered to said estate by complainant are worth nearly, if not quite, as much as she has received from it for her yearly support; that the lands now remaining in the hands of the legatees under said will, charged with her support, consist of a considerable body of lands in said county of Twiggs, possessed at this time by her sons, William B. Tarver and Benjamin M. Tarver, who reside in said county, some of which lands belonged to her said husband at the time of his death, and the rest of which have been purchased with the proceeds of the sale of other proper-

ty belonging to said estate; that all of said property is now encumbered by liens held by the firm of Colquitt & Baggs, of the county of Chatham, which liens were created by her said sons, and are as follows, to-wit: a mortgage lien, dated January 30th, 1871, on fifty-five head of mules and plantation utensils, besides the crop of 1871, to secure a note for $5,000, alleged to have been advanced by said Colquitt & Baggs; a mortgage lien, dated February 24th, 1871, on the plantations in said county of Twiggs, known as the "Green Jordan" place, the "Frederick" place, the "Mill" place, and a portion of the "Crittenden" place, to secure a note for $8,000; a mortgage lien dated February 24th, 1871, on the plantation known as the "Houston" place, the "Tarversville" or "Home" place, and the "Smith Mill" place, to secure a note for $7,000; that the lien first aforesaid has been nearly if not fully paid; that the mortgage last aforesaid was given to secure a note for fertilizers which proved to be utterly worthless; that said Colquitt & Baggs are proceeding to foreclose said mortgage liens, with a view to bringing said property to sale; that if this end is accomplished, complainant's right to the support provided for by said will, and contemplated by her said husband, will be wholly destroyed, and she will be left with no other means of livelihood save her own personal exertions; that the support intended by said will should not only be placed beyond contingency for the future, but complainant should be allowed for the past that which her said husband intended to provide, but which she has failed to obtain. Prayer that Colquitt & Baggs may be enjoined from foreclosing the mortgages until the further order of the Court; that the property aforesaid may be decreed to be charged with such sums of money as may be found due to complainant for her past and future support. Complainant waives discovery.

Defendants answered the bill substantially as follows: That they advanced the money as charged, and took said mortgages in ignorance of the rights of complainant, and without

any notice or knowledge thereof, applicable particularly to the after-acquired property. One of said firm answered additionally, that the mortgages were taken to secure these debts, after considerable correspondence on the subject, in the house of complainant, she being present when the instruments were being written, and a description of the property being given, she not objecting or disputing, though she must have known what was being done; that some of the letters written by defendants to William B. and Benjamin M. Tarver were in complainant's work-basket, in the room where the mortgages were being written, and must have been seen by her.

William B. Tarver filed his affidavit, that there was no written correspondence on the subject, and his mother had no notice of the mortgages, or of any intention to give them, previous to their execution.

Colquitt & Baggs further answered and pleaded, that while it might be true that, by the *first* item of said testator's will, a charge was intended on the property specified in *that item*, for the support of complainant, at least until her two sons, William B. and Benjamin M., arrived at age—now long past—or possibly to the end of her life, a proposition which can only be settled by reference to the original will, (the production of which they pray for that purpose,) yet they say, and so insist, that this provision in favor of complainant was adeemed and annulled, and the whole testamentary scheme of testator, as disclosed by said first item of will in respect to the property therein embraced, changed by the first item of a codicil to said will, afterwards made and published and admitted to record, wherein the said testator made a different disposition of said property wholly inconsistent with the disposition made thereof, in the first item of said will, and gave to complainant another and different provision out of a part of said property in favor of said complainant, in substitution of what was intended for complainant by said first item.

The following is a copy of the parts of the will of Hartwell H. Tarver, and of the codicil thereto, applicable to the questions raised by this case:

"Item 1st. I give and devise my plantation at Tarversville, and on which I now reside, together with all the furniture, horses, carriages, mules, stock of every kind and description, together with all negroes on said plantation; also, I give and bequeath all my lands, negroes, stock and farming utensils on all the lands, together with the lands owned by me in Twiggs county, except a plantation known as the 'Frederick place,' with the negroes and stock on it, which I give to my son, John H.; also, my plantation in Pulaski county, together with all the negroes, horses, mules, stock and farming utensils on said plantation; also, my 'Buzzard Roost plantation,' and all that is on it, I give and bequeath to my executors hereafter named, for the uses and trusts hereinafter designated.

"First—My wife is to have the use of the house, furniture, carriages, horses, and everything necessary for her comfortable support, together with an ample and sufficient support out of and from said plantation, during her natural life or widowhood. But should she marry again, then, and in that event, she is to have the following negroes only, to-wit: Phil and his wife, Kittie, and all their children; Eliza, Bella and her children, for and during her natural life; and at her death, the said negroes are to be eqhally divided between my children by my said wife. These negroes to be all and everything my wife is to have out of my estate, if she marries again, and the balance of the products of my plantations herein described to be used and managed by my executors for the use and support of my children by my present wife, until they become of age, and for the payment of my just debts, which I direct to be paid out of the proceeds of my said plantations; and when my children by my present wife arrive at age, all my property herein named, and all its increase, except the thirty negroes I have heretofore given to

the children of my wife by her former husband, and except, also, certain negroes I have hereby given to my daughter Dolly, and specifically named in the bequest to her; and except, also, Julia and her children, which I give to my son Paul E. Tarver; and also Jacob, which I give to my son Frederick; and also Willis, which I give to my son Henry; and also Henry, I give to my son John—all of which said last-named negroes belonged to the mother of my said first children; and as I have heretofore given to the children of my present wife by her first husband a large amount of property, and have also secured to my wife an ample competency, this is to be in lieu and place of her dower in and to all or any of my lands wheresoever situated.

"Item 2d. Devise to Paul E. Tarver.

"Item 3d. Devise to Henry A. Tarver.

"Item 4th. Devise to Frederick R. Tarver.

"Item 5th. Devise to John H. Tarver.

"Item 6th. Devise to Dolly E. Colquitt.

"Item 7th. Devise in reference to the place at Indian Springs, and all property in Butts county.

"Item 8th. As to payment of debts and certain specific legacies, and the division of the residue arising from sale of property therein named, among all his children.

"Item 9th. As to sale of stock in Merchants' Bank at Macon, and its equal division among all his children.

"Item 10th was as follows, to-wit: 'I hereby authorize and empower my executors, hereinafter named, to sell all or any portion of my property *I have given to my minor children*, if, in their judgment, the circumstances of the country should so require it; and if they should deem a sale indispensable, they are to consult the interest and feelings of my wife; and if she should not wish her interest sold, *then they are to reserve my residence in Twiggs county, and four hundred acres of land adjoining and contiguous thereto, and the negroes I have given her in the event of marriage, together with the furniture, horses, carriage and farming utensils, for her*

support during her life; and if they should sell *the property given to my minor children, they* are to invest the proceeds in same proportions given to them by this my will: this power given to my executors to be exercised to the best interest of my wife and minor children, and not to be exercised unless, in their judgment, circumstances seem to require it. But if aggressions on the South continue, and they should deem it advisable, for the best interest of my minor children, then they are empowered and directed to sell said property in any manner they may see fit and proper."

CODICIL TO WILL.

"STATE OF GEORGIA—TWIGGS COUNTY:

"Whereas, I, Hartwell H. Tarver, did, on the 12th day of October, 1850, sign, seal and publish my foregoing will and testament, in presence of Burwell Jordan, Robert R. Slappy and Carlton B. Cole, who signed said will as witnesses; and, whereas, I am desirous of changing certain devises and bequests, and also of disposing of other property since acquired by me, I do, therefore, make and publish this codicil as a part of my will:

"1st. I revoke and annul so much of the first item of my will as gives a life-estate to my wife, Harriet, in and to the negroes, Phil and his wife, Kitty, and their children and increase, Eliza and Bella; and in addition to those negroes, I give her Rosa, one of the children of Susan; and I give my said wife said negroes and their increase forever in fee. And I desire a further alteration in the first item of my will, in which I give all my negroes on my plantation in Twiggs (except the 'Frederick place),' as well as all my negroes on my 'Pulaski place,' to my youngest sons, William and Benjamin; and in lieu thereof, I desire that my executors should set apart ninety negroes, to and for each of my said children, William B. and Benjamin, together with the negroes I got by their mother, together with their increase. Said ninety negroes are to be taken from the place on which

I now reside and the 'Pulaski place' (excepting those negroes that I have or may specifically devise to others); and should there not be enough negroes on those two places to make up the ninety to each of said children, then I desire them to be taken from my 'Buzzard Roost' and 'Smith places,' jointly with the other two places. Said ninety negroes to each of said children are to be selected by my executors, in families, as near, as it can be done, so as to be equitable. I further desire this further alteration in the first item of my will, to-wit: I desire that my executors shall lay off one hundred acres of land out of my 'Tarversville place,' including the Lee houses and blacksmith shop, and making the house in which the post-office is now kept the front line, laying of said hundred acres in a square—which I give and bequeath to my sons, Frederick and John, for the purpose of erecting residences thereon, in future. I desire that the negroes, as well as the mules, cattle, etc., given to my daughter, Dolly E. Colquitt, during her natural life, in the sixth item of my will—that is, those on the 'Smith plantation'—shall remain there two years after my death; and I desire, further, that the property given my executors in trust for her, in said item, shall, in the event of her death, or in the event of the death of her child or children before marriage, or before arriving at the age of twenty-one, revert back, and be divided equally among my children, share and share alike. In the bequest to my son John, I give him a negro called Henry—his name is Miles, and I intended Miles instead of Henry; and in addition to what I give my son John, in my said will, I hereby give him ten negroes in addition thereunto, to be selected and set apart to him, by my executors, in families, so far as it can be equitably done, to be taken from my negroes not specifically given. I desire that my son, Frederick, have my body-servant, Tucker, and I hereby give Tucker to him, in addition to other bequests to him.

"In addition to the negroes disposed of by my will and codicil, I have about seventy not disposed of. I hereby give

to my son, Henry, six of said negroes, to be selected by my executors, in families, as far as it can be equitably done. I give, to my son John, Susan and her child, both on my Tarversville place. The balance of my negroes not disposed of, being about sixty-four in number, I desire to be kept on the place where they now are, for two years after my death, and that they and their increase be equally divided between my wife and all my children, share and share alike, to them forever, except a share that may fall or go to my daughter Dolly, which is to go to the trustees hereinbefore named for her, to be held by them in trust for her in the same manner as the property given her by my will.

"I desire my executors, two years after my death, to sell and dispose of my surplus stock of mules, horses and cattle, and everything else, retaining sufficient to keep up the plantation directed to be kept up by said will. I desire my executors also to sell all and any land that I may die possessed of, and not sold or given away by me. I also desire that my sons, Frederick and John, may remain and live at Tarversville, without cost or charge, till my youngest child becomes of age, if they desire to do so.

"It is further my will and desire that my four sons, Paul, Henry, Frederick and John, pay to my sons, William and Benjamin, as they may respectively become of age, the sum $2,500 each; and the said sum is hereby made a charge on the estate given by me in my will to my said four sons, Paul, Henry, Frederick and John."

Upon argument of the motion to dissolve the injunction issued in accordance with the prayer of the bill, the Court passed the following order:

"After argument had in the above stated case, it is ordered that said injunction be retained, and continued in the penal sum of $5,000, and that said Colquitt & Baggs are enjoined and restrained from proceeding to foreclose their said mortgages, so far as all the land set forth and mentioned in said bill is concerned, except the place or plantation mentioned in

said mortgage and bill, called and described as the 'Frederick place,' which said 'Frederick place' they are authorized to proceed against by foreclosure of their mortgages or other legal proceedings in their discretion, July 26th, 1872. This injunction and order also applies to and covers all the mules, farming utensils and other personal property set forth and mentioned in said mortgages and bill."

Plaintiffs in error excepted to said order and now assigns the same as error.

LYON & IRVIN; W. K. DEGRAFFENREID, for plaintiffs in error, submitted the following brief:

1st. The allegations in the bill are not sufficiently certain and explicit to entitle complainant to injunction and relief. See Dulin *vs.* Caldwell & Co., 28 Ga., 120; 22d, 4; Green Tracey & Co. *vs.* Ingram, 11 Ga., 171; Davenport *vs.* Alston, 14 Ga., 275; 1 Daniel Ch. Pr., 372, 273; Mitford, 126; Black *vs.* Black, 15 Ga., 449; Crawford *vs.* Ross, 39 Ga., 4[illegible]; Jones *et al. vs.* Macon & Brunswick Railroad, 39 Ga., 139.

2d. A Court of equity will not lend its aid against a *bona fide* purchaser, and a mortgagee is such a purchaser: Behn & Foster *vs.* Young & Co., 21 Ga., 207; Rutherford *vs.* Billings, 29 Ga., 38; Calhoun *vs.* Tullas, 35 Ga., 119; Jones *vs.* Dougherty, 10 Ga., 273; Semmes *vs.* Moses *et al.*, 21 Ga., 439; Harrup *vs.* Winslett, 37 Ga., 655; Thrasher *vs.* Porter, 37 Ga., 392.

3d. A subsequent will or codicil revokes former will as to inconsistent dispositions: Nelson *vs.* Gifford, 3 Barbour, Ch. 158; 1 Jarman on Wills, 166—note-marginal, page 123, top page 196–7, marginal 160; 1 Williams on Executors, 129, 130; Larrabee *vs.* Williams, 28 Vt., 274; Barlow *vs.* Coffin, 24 Howard, 54.

4th. While it is true that the revocation extends only to the inconsistencies, yet it appears from a consideration of the whole will, that the testator had a general scheme by his will, which the change by the codicil defeats, then the revocation

goes to the whole disposition: Harris *vs.* Clark, 3 Sedden N. Y., 242; Snowhill *vs.* Snowhill, 3 Zabris., 447; Atkins *vs.* Kron, 5 Iredell Eq., 217; Robinson *vs.* London Hospital, 21 Eng. Law and Eq., 371; *in re* Cooper's estate, 4 Barr, 88; Biddle *vs.* Caraway, 6 Jones' Eq., 95, 366; Purnell *vs.* Dudley, 4 Jones' Eq., 203; Marshall *vs.* Marshall, 11 Penn., 5 S. R., 430; Bradford's Will, Select Eq. cases, 163.

5th. There is no equity in the bill, because, if complainant is entitled, under the will, to this charge on the lands, the mortgagees are, notwithstanding, entitled to foreclose and sell as against the mortgagors, so as to get their interest out of the mortgaged property for the satisfaction of their debt; and the complainant's charge on the land will continue to follow it in the hands of the purchaser at the mortgage sale: Phillips *vs.* Humphries, 7 Iredell Eq., 206; Pickering *vs.* Pickering, 15 N. H., 281; Wallace *vs.* Wallace, 3 Foster, 182; Copp *vs.* Hersey, 11 Foster, 317; Clyde *vs.* Simpson, 4 Ohio, N. S., 445; Hunter *vs.* Stembridge, 12 Ga., 192.

6th. Ademption. See Swoope's Appeal, 27 Penn. State Rep., 58; 2 Williams' Exrs., 1132, *et passim.*

WHITTLE & GUSTIN; LANIER & ANDERSON, for defendant in error, submitted the following brief:

1st. The support of Mrs. Tarver was a charge upon the lands in Twiggs and Pulaski counties only, and it follows the lands in the hands of all parties: Code, section 2210.

2d. There is no revocation or ademption by the first item of the codicil. No new testamentary scheme appears from the codicil, and no intention to revoke, and the first item of the will is not inconsistent with it: Code, secs. 2420, 2427, 2435, 2438, 2439.

3d. Mrs. Tarver having accepted the legacy in lieu of dower, is a purchaser for valuable consideration. This being so, it places the support due her annually in the position of a debt, and her failure to collect it as it became due does not operate as a bar to its collection.

4th. The will having been regularly admitted to probate and record was notice to everybody, especially to a firm, one of whose partners admits actual knowledge of the contents of the will.

5th. There is no evidence that Mrs. Tarver, by any act on her part, misled these parties as to the existence of this charge. Even if there were conflict on this, it is a matter for the Chancellor to decide on the motion for injunction, and for the jury on the final trial.

6th. The judgment upon foreclosure being a judgment *in rem*, would bind Mrs. Tarver: Code, sec. 3774.

WARNER, Chief Justice.

This is a bill filed by the complainant against the defendants, praying for an injunction to restrain the foreclosure and sale of certain described property which had been mortgaged to the defendants by William B. Tarver and Benjamin M. Tarver, the sons of complainant. The Court granted the injunction, to which the defendants excepted. The complainant alleges in her bill that she is the widow of H. H. Tarver, deceased; that by his will the property embraced in the mortgages, or a considerable portion thereof, was charged by the will of her late husband with her support and mainteance during her natural life or widowhood, in lieu of dower out of his real estate. The prayer of the bill is, that the amount to which she may be entitled for her support and maintenance shall be ascertained, and be first paid to her out of the mortgaged property, as constituting a prior lien or charge thereon.

There is no good legal or equitable ground shown by the complainant's bill why the mortgages should not be foreclosed, as between the mortgagors and mortgagees; the foreclosure of the mortgages as to the debts due by the mortgagors to the mortgagees will not in any manner affect the complainant's rights to her support out of the mortgaged

property, provided the same is not sold under the judgment of foreclosure; in that event, her rights might be complicated. In our judgment the codicil to the testator's will does not adeem or revoke the first clause in his will which charges his estate with the support and maintenance of the complainant during her natural life or widowhood, in lieu of dower, and she is entitled to have the amount ascertained and decreed to her, to which she may be entitled out of the mortgaged property which was owned by the testator at the time of his death, or which has since been purchased with the trust funds arising from the sale of the property charged with her support, with *notice* to the mortgagees, that it was so purchased with the trust funds arising from the sale of said property. The record of the probate of the will of the testator was notice to the mortgagees, that the property specified therein was charged with her support and maintenance, but would not be notice as to other property purchased since the testator's death with trust funds arising from the sale of the encumbered property. In view of the facts of this case, we shall direct that the injunction be so modified as to allow the mortgagees to foreclose their mortgages against the mortgagors, but restrain them from selling the mortgaged property described in the testator's will, and so much thereof as was purchased with the trust funds arising from the sale of the property charged with the complainant's support, if the complainant shall allege in her bill that the mortgagees had notice that it was so purchased with the trust funds at or before the date of their mortgages, excepting the "Frederick place," under their judgment of foreclosure, until the complainant shall first ascertain by a decree of the Court on the hearing of her bill, what amount she is entitled to for her support and maintenance out of the mortgaged property.

Let the judgment of the Court below be affirmed with instructions.

MARY J. KING, plaintiff in error, *vs.* JOSHUA A. KING, defendant in error.

The discretion of the Judge of the Superior Court granting a new trial will not be controlled unless abused. (R.)

Where a bill was seeking to pursue a trust fund which had been paid by K. to M., the attorney, by him to F., the trustee for complainant, and by him had been turned over to G., his successor, said fund being in Confederate money; and the questions in controversy were whether all or either of the parties who had received the Confederate money, had done so in bad faith, so as to make them all or any of them liable to complainant, it was error to dismiss the defendants, F. and H. the administrator of G., as not being proper parties. (R.)

Where the fact that complainant went to Rome to receive the Confederate money was proven, her reasons stated at the time for her act should have been received as part of the *res gestæ*. (R.)

New trial. Evidence. Declaration. Fraud. Trust. Parties. Before Judge PARROTT. Floyd Superior Court. January Term, 1872.

Mary Jane King filed her bill against Joshua King, Daniel R. Mitchell, William Franklin and Henry A. Gartrell, containing substantially the following allegations; That in the year 1849 she was married to the defendant, Joshua King, and had by him two daughters, both now living, the eldest, Beatrice, aged sixteen years, and the youngest, Ida, aged twelve years; that during the coverture the defendant, King, received into his possession property to the value of $8,000, inherited by complainant from her father and her sister; that complainant was divorced from her said husband on July 6th, 1863; that some time prior to the institution of said suit for divorce complainant and her said husband entered into an agreement of separation, by virtue of which said King was to hold the sum of $4,300, as trustee for complainant, and her said two minor children, and to pay over to complainant semi-annually the interest on the said sum, retaining the *corpus* undiminished for said children after the death of complainant; that said defendant soon after the aforesaid separation failed to pay the interest as contracted; that com-

plainant employed the defendant, Daniel R. Mitchell, as her attorney to collect said unpaid interest, expressly instructing him to sue for nothing beyond the interest as she wished the principal sum to remain in said King's hands according to the terms of the articles of separation; that said Mitchell, contrary to said instructions, had the defendant, Franklin, appointtrustee for complainant, and on July 6th, 1863, in the name of said Franklin, in Floyd Superior Court, recovered a judgment against the defendant, King, for the sum of $4,300, expressed to be in full of all alimony; that when complainant heard that judgment had been recovered as aforesaid, she expressly notified said defendants, Mitchell and Franklin, not to receive Confederate money in payment of the same; that about six months after the date of said judgment, said Mitchell, combining with said King, informed complainant that if she and her said trustee refused to receive Confederate money, the military authorities of the Confederate States would compel them by force; that thus misled and frightened, complainant consented, and on January 1st, 1864, said judgment was paid off to said Franklin in Confederate money, then worth only five cents in the dollar; that on January 30th, 1864, said Franklin turned over said Confederate money to the defendant, Gartrell, who had been appointed trustee for complainant in his place; that said Gartrell has converted said trust fund to his own use, never having paid to complainant principal or interest beyond the sum of $75; that said King is liable to pay said $4,300, with interest on the same, less the value of said Confederate money payment; that said Franklin is liable for any depreciation of said funds whilst in his hands, which he could have prevented; that said Gartrell is liable for the value of the funds received by him; that if the said King is held discharged from liability by said Confederate money payment, then said Mitchell is liable to complainant and her minor children, by reason of the aforesaid false and fraudulent representations and threats; prayer for discovery, relief and the writ of subpœna.

Complainant subsequently amended her bill substantially as follows, to-wit: That by the last agreement between complainant and the defendant, King, the defendant, Franklin, was mutually selected as trustee for complainant, said Franklin accepting the trust on February 11th, 1861; that on March 1st, 1861, said King delivered to said trustee his note for $4,300, due twelve months after date, indorsed by Samuel T. King, and three other notes for the interest to become due on said sum for the first twelve months; that said defendant, King, in order to pay off said notes in a depreciated and worthless currency, with a view to that end, in the year 1862, refused to pay either principal or interest, and procured the said indorser to notify the said trustee to sue to prevent the discharge of said indorser; that said note for $4,300 was delivered to the defendant, Mitchell, for suit in accordance with the terms of said notice; that said King and Mitchell entered into a fraudulent agreement, by which said King contracted to confess judgment on said suit if said Mitchell would receive Confederate money in payment of the same; that in accordance with said agreement, without any authority whatever, said Mitchell, on July 10th, 1863, did receive Confederate money in payment of said judgment, principal and interest; prayer, that the pretended discharge of said King, by reason of said payment, given by the said Mitchell and Franklin, be set aside. The defendant, Gartrell, having died pending suit, his administrator, Robert T. Hargrove, was made a party. Upon demurrer filed, the bill was dismissed as to the defendants, Franklin and Hargrove, and complainant excepted. The defendant King answered the bill substantially as follows: That defendant only received, by virtue of his marriage with complainant, the sum of $3,008.60⅔; that the two agreements made in connection with the separation of complainant and defendant are hereto annexed, marked Exhibits A. and B.; that defendant cannot know what instructions were given by complainant to her attorney, Mitchell, but defendant does know that three suits

were commenced against him by said Mitchell upon his said notes, judgments recovered and paid off by this defendant; that the charge is a strange one, that defendant combined with said Mitchell to defraud his own children, in view of the fact that defendant has always supported, and is now supporting and educating them, intending to advance them in life as far as his means will allow.

In answer to the first interrogatory, defendant says, that the entire amount of property received by him through complainant from her father's and her sister's estate, was $3,007.60⅔.

In answer to the second, that the agreements hereto annexed show that all negotiations and understandings were superseded and canceled by the second.

In answer to the third, that he knows nothing of complainant's instructions to her attorney; that there was no understanding between Mitchell and defendant about what money was to be paid, the confession of judgment being made to save costs and to get rid of the suits as soon as possible.

In answer to the fourth, that he paid to Daniel R. Mitchell, complainant's attorney, in July, 1863, the principal and interest of said judgments amounting to about $4,525.75; that defendant knows nothing about what was said or done by Mitchell to induce complainant to receive Confederate money; that defendant was most desirous of turning over property in payment of said claim before suit was brought, and so notified the parties, and offered to turn over property at a gold valuation, but contrary to said proposition, very much against this defendant's protestation and very much to his damage and injury, he was sued for the money which forced him to sacrifice property and means more than sufficient at a gold valuation than to pay said debt.

(EXHIBIT A.)

"GEORGIA—FLOYD COUNTY:

"The following is the basis of a settlement agreed upon by and between Joshua King and his wife, Mary J. King, to-

wit: They hereby agree to separate and to grant each a divorce, or allow each to obtain a divorce, agreeing each to the other that they will set up no defense to a suit for such divorce.

"The said King hereby agrees to settle absolutely on said Mary J. King, $3,500, to be paid to her the day, or as soon as both are lawfully divorced, a *vinculo matrimonii*. The said Joshua King further agrees to settle upon his three children by said Mary, $3,000, to be left in trust absolutely to them, and in the event that all three of said children should die previous to the death of said Mary J. King, then and in that event, $1,500 of said $3,000 to go to said Mary J. King. It is agreed that said Mary J. King is to retain and keep the youngest named, Bertha, and that said Joshua King is to keep and maintain the two eldest, Beatrice and Ida, said King to pay all reasonable expenses for the maintenance of all their children and said Mary up to the time of divorce, and to pay Judge A. R. Wright and D. S. Printup each $100, as attorneys, for services in making the settlement and procuring the divorce. The said Joshua King is to pay, from the time the said divorces are obtained, the interest on the $1,000 of the $3,000 settled in trust on his children, to said Mary King, for the support of the said youngest child, which said Mary J. King retains, said amount of interest to be $70, to be paid annually. The said King to be appointed the trustee for said children by giving and entering into bond and security for the same. Agreed to, as witness our hands and seals, this the 21st day of July, 1860

(Signed) "JOSHUA KING, [L.S.]
"MARY J. KING, [L.S.]"

(EXHIBIT B.)

"ROME, 9th of February, 1861.

"Mrs. Mary J. King submits the following propositions, to-wit:

"1st. William D. Franklin will be selected for her trus-

tee; if he refuses to accept, she will select some reliable person except Dr. John S. Hughes and Henry Dobson.

"2d. Dr. King will convey to her trustee $4,300 in property, the property to be agreed upon and the price thereof by said trustee and King, and upon failure to agree as to the property and price, Dr. King will secure the payment of the $4,300 in cash to said trustee, with interest thereon from the date or from the time he failed to pay the $25 alimony in pursuance of Judge Hammond's order, which was revoked at last Court. The property or money, as the case may be, to vested in said trustee during the natural life of Mrs. King, and at her death to go to and be the absolute property of her three children by said King. The rents, issues and profits of said property, or the interest on said money, to go and be for the absolute use and benefit of Mrs. King during her natural life, for her individual support, maintenance, and be so applied by her trustee.

"3d. Dr. King to support, maintain and educate their three children at his individual expense, the youngest one to remain with Mrs. King until it is seven years old, she supporting and clothing said child until that time, Dr. King paying her trustee, for her, $100 per annum.

"4th. Dr. King to pay the entire costs of the suits, and pay to D. R. Mitchell $100 for his fees as Mrs. King's attorney. (Signed)

"D. R. MITCHELL,
"Attorney for Mrs. King.
"MARY J. KING."

"This proposition accepted and agreed to by me, this 9th of February, 1861. (Signed)

"JOSHUA KING.

Attest:

"THOMAS J. WORD,
"JESSE LAMBERTH, Ordinary."

The answer of the defendant, King, to the amendment to complainant's bill denied all the material allegations therein contained.

The defendant, Mitchell, answered the bill, substantially, as follows: That he knew nothing of any deed of separation entered into between complainant and her husband prior to the suit for divorce; that the contract of February 9th, 1861, was brought about through the negotiations of defendant; that the selection of the defendant, Franklin, as trustee for complainant, was made entirely independently of defendant, as he had, at that time, no acquaintance whatever with said Franklin; that, on February 11th, 1861, said Franklin came to the office of defendant, in the city of Rome, and stated that he had consented to become the trustee of complainant, who was his cousin; that, some time thereafter, said Franklin again called on defendant and informed him that he (said Franklin) and said Joshua King had not agreed on the price of the property, to be taken in payment of said $4,300, and that rather than allow the prices demanded by said King for some negroes, he had, after consultation with complainant, determined to take the money; that defendant heard nothing further from said Franklin until he brought to him the original, of which the following instrument is a copy:

"GEORGIA—FLOYD COUNTY:

"*To William D. Franklin, Trustee for Mary J. King:* You are hereby notified that I shall hereafter refuse to pay the interest, or any part of the principal of the note for $4,300, given for the use of Mary J. King, the consideration thereof having entirely failed. The said Mary J. King having entirely failed to comply with the agreement and understanding had at the time; and, further, she having taken possession of a large portion of the property, which was understood was to be turned over to her in lieu of said note, and the balance is now ready to be turned over at a fair valuation, and I am willing and ready to comply in turning over

the property, according to said agreement. February 15th, 1862. (Signed)

"JOSHUA KING."

That Franklin stated that he had made no arrangement with said King, further than to take his note for $4,300; that if complainant had made any other arrangement with said King, he knew nothing of it, and that he knew of no other remedy than to sue the note and collect the money; that defendant advised said Franklin to bring suit on the note and collect the money, in order that he might hold the same subject to his control; that defendant sued said note to the July Term, 1862, of Floyd Superior Court, and obtained judgment at the July Term, 1863; that, at the judgment term, the defendant, King, asked him if he would take Confederate money in payment of said indebtedness, to which defendant replied that he would, unless instructed to the contrary, as it was the only currency of the country; that said King then stated he would confess judgment, which he then and there did, through his attorneys; that, on July 10th, 1863, defendant received, in full of said judgment, Confederate money, most of it being what was called seven-thirty, or interest-bearing Confederate States Treasury notes; that, on October 8th, 1863, defendant paid to said Franklin, after deducting the usual commissions, the sum of $4,534, in full of said claim; that complainant never employed defendant to sue said King to recover the interest due on said note, or any other note or sum of money whatever; that complainant never gave to defendant any instructions touching a suit of any kind for money, either principal or interest, against said King; that complainant never instructed defendant not to receive Confederate money on said claim, but, on the contrary, after the aforesaid collection, complainant importuned him to pay the money to her, which he declined to do, but finally let her have $50, which was allowed him in his subsequent settlement with her said trustee; that the entire

charge in said bill, as to the advice of defendant to complainant and said Franklin, to the effect that they would be compelled by military authority to receive Confederate money, is false.

The answer of the defendant, Mitchell, to the amended bill denied all the material allegations therein contained.

The following evidence was introduced for complainant:

R. D. HARVEY, sworn: About the time of the passage of the Funding Act, I quit taking Confederate money for my clients, without first consulting them. The Funding Act was passed February 17th, 1864. I was a practicing attorney during the war; and when the currency got down to be worth not more than ten cents on the dollar, I would not receive it for clients without first getting their consent.

THOMAS TUMLIN, sworn: When Confederate money became badly depreciated, I ceased receiving it, except in cases where I considered the debts doubtful. I tried to pay a debt to my uncle, Lewis Tumlin, during the war, in Confederate money, and he told me I ought not to want to pay it, and I did not pay it until since the war. I quit taking Confederate money in the spring of 1863. I do not think prudent men were receiving it as late as July, 1863.

A. R. WRIGHT, sworn: I was not the paid counsel for either party, in the suit on the note for $4,300. I advised King to confess judgment. King told me he could pay off the claim in Confederate money, and asked my advice in the matter. I told him I did not think it would be received, but if he could do so I advised him to do it. I knew King and Mitchell were unfriendly at the time, and are now, I believe. I do not think that there was any collusion between King and Mitchell, nor that King acted in bad faith in confessing and paying the judgment.

Barber's table was introduced, showing that Confederate money was, as compared with gold, on July 1st, 1863, eight of Confederate money for one of gold; on July 15th, 1863, ten of Confederate money for one of gold; on October 1st,

1863, was thirteen of Confederate money for one of gold; and, on October 15th, 1863, was twelve and one-half of Confederate money for one of gold.

WILLIAM D. FRANKLIN, sworn: I became trustee for complainant, at the request of Joshua and Mary J. King. Nearly one year after Joshua King gave the note, he desired to settle with Mary J., by delivering to her some negroes. She came up after me to go down and see if we could agree on the price of the negroes. I thought King's prices on the negroes too high, and therefore did not trade. King gave four separate notes for the interest, and paid all but one. Nearly one year after the note for $4,300 was given, he served me with the written notice that he would not pay anything more. S. T. King notified me to sue on the notes in the fall of 1862. I commenced suit to prevent the release of S. T. King as security. I did not expect to collect any money, as there was no collecting law. I did not expect to receive Confederate money in payment, and did not do so until authorized and requested so to do by complainant. I did not authorize the defendant, Mitchell, to receive Confederate money in payment of the trust fund. I received $4,534 in Confederate money from the defendant, Mitchell, on October 8th, 1863; paid complainant on the same day $234; paid the defendant, Gartrell, on March 17th, 1864, $4,300, with some interest that had accumulated on interest-bearing bills. Complainant came after me to go down to Rome and get the money. I went with her and received it in her presence. [Mrs. King said that she was destitute, and that the military would force her to take Confederate money, and that she had as well do it, and be living on it, is what was said, to the best of my recollection.]

Defendants objected to all that part of the foregoing testimony enclosed in brackets. The objection was sustained by the Court, and the complainant excepted.

The complainant and Mrs. Eliza Dupriest, her mother, testified and sustained all the substantial allegations of the

bill as to the instructions of complainant to the defendant, Mitchell, in reference to the enforcement of the provisions of the articles of separation against the defendant, King.

The defendants introduced no testimony. The jury returned the following verdict, to-wit: "We, the jury, find for plaintiff $4,300, principal, with interest, against defendant, Dr. J. A. King —

Amounting to	$7,327 00
Less	732 00
Total amount	$6,595 00

We find in favor of defendant, D. R. Mitchell.

The defendant, King, moved for a new trial, upon several grounds, unnecessary here to be set forth. The Court sustained the motion, and ordered a new trial, and complainant excepted.

During the trial the complainant requested the Court, in writing, to charge as follows, to-wit:

"If the jury believe, from the evidence, that Dr. King did not act in good faith in the payment of the debt, such payment is no protection to him, except to the extent of the value of the Confederate money. Whether Dr. King did or did not act in good faith is a question of fact for the jury to decide from all the evidence in the case." The Court modified the request by omitting the words, "did not act in good faith," and by substituting in their stead these words, "acted fraudulently, that he committed acts of fraud;" also, by omitting the words, "in good faith," in the second sentence of the request, and by substituting the word "fraudulently." To which refusal to charge and modifications of the written request to charge, complainant excepted. Complainant assigns error upon each of the aforesaid rulings.

A. R. WRIGHT; E. N. BROYLES, for plaintiff in error.

1st. Dismissal of bill as to Franklin and Hargroves, admis-

istrator, was error: Story's Eq. Pl's, 284, 298; 7 Ga., 549; Hill on Trustees, 416. 2d. Charge should have been given as requested: 1 Bouv. Ins., 249; 37 Ga. R., 205, 220. 3d. King acted fraudulently, and therefore the discharge of said judgment is void: Code, sec. 3116; 1 Bouv. Dict., 613; 27 Ga. R., 453; 2 Pars. on Con., 767; Code, secs. 2709, 3123; 22 Ga., 594; Code, secs. 2908, 3122. 4th. Release by trustee, without consent of the beneficiary, set aside: 2 Pars. on Con., 715; Hill on Trustees, 274. 5th. Whether King acted in good faith is a question for the jury: 41 Ga., 439; 39th, 100, 569, 573; 38th, 311; 37th, 205, 230. 6th. Verdict was not sufficiently against the evidence as to require a new trial: 41 Ga., 71, 211, 299; 8th, 306; 10th, 381.

PRINTUP & FOUCHE; J. W. H. UNDERWOOD, for defendant. There was no evidence that King did not act in good faith, and a reviewing Court will not control the discretion of the Superior Court, except in extreme cases: 42 Ga., 219; 40th, 91; 38th, 129; 37th, 537; 36th, 604; 35th, 271; 34th, 375.

WARNER, Chief Justice.

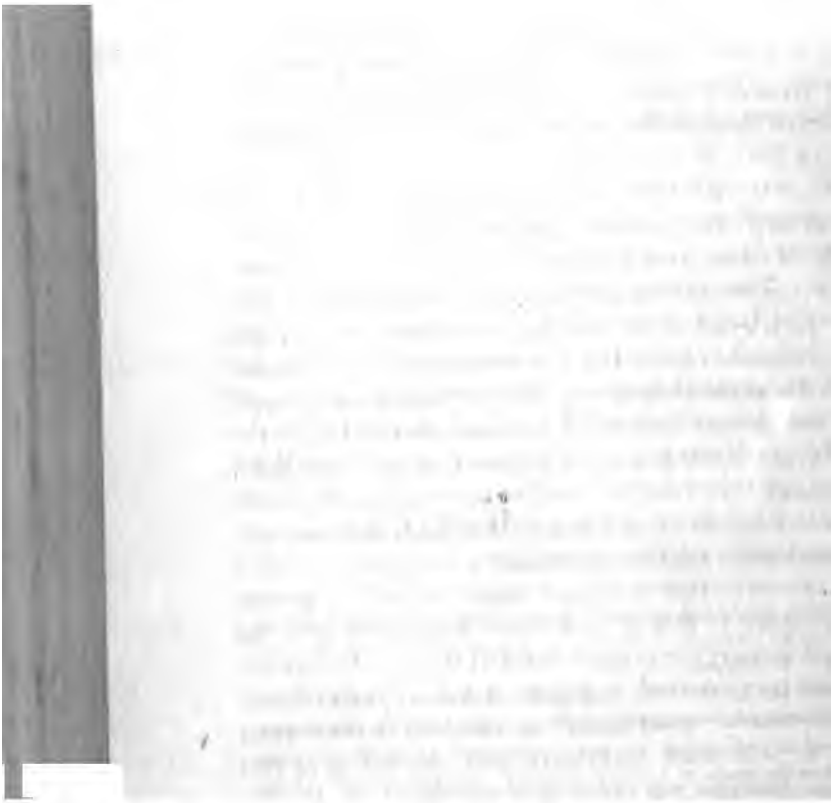
This was a bill originally filed in behalf of complainant and her two minor children, against the defendants, King, Mitchell, Franklin and Gartrell, to recover the value of a trust debt, which the complainant alleges had been fraudulently paid in Confederate money, and received by Franklin, her trustee, in bad faith, and paid over by him to his successor, Gartrell, who had misappropriated and misapplied the same to the injury and damage of the complainant. On the trial, the Court having dismissed from the bill the defendants, Franklin and Gartrell, the jury found a verdict against King for the sum of $4,300, with interest thereon, and also found a verdict in favor of the defendant, Mitchell. The defendant, King, made a motion for a new trial, which was granted by the Court, whereupon the complainant excepted.

The presiding Judge of the Superior Court is clothed with the power and authority by the Constitution and laws of the State to grant new trials, and, in the performance of that duty so devolved upon him, he may exercise a sound discretion in granting or refusing a new trial in cases where the verdict may be decidedly and strongly against the weight of the evidence, although there may appear to be some slight evidence in favor of the finding. In this case, the presiding Judge, in the exercise of the sound discretion vested in him by law, has granted a new trial, and we cannot say, in view of the facts disclosed by the evidence in the record, that he has abused that discretion, so as to authorize this Court to control it, and we therefore affirm the judgment of the Court granting a new trial.

The plaintiff in error, however, excepts to the rulings of the Court in dismissing the defendants, Franklin, and Hargroves, the administrator of Gartrell from the complainant's bill, as not being proper parties defendants thereto, and also in ruling out that portion of Franklin's answer to the seventh interrogatory, as to what Mrs. King said when she came after him to go down to Rome and receive the Confederate money, to-wit: "Mrs. King said she was destitute, and that the military would force her to take Confederate money, and that she had as well do it and be living on it;" and in substituting the words "acted fraudulently," instead of the words "did not act in good faith," as contained in the written request to charge the jury. In our judgment, it was error in the Court below in dismissing the defendants, Franklin and the legal representative of Gartrell, as parties defendant to the complainant's bill, and especially so, under the decision of this Court in this case at a former term as to the liability of the respective defendants, then parties to the bill. The complainant was seeking to pursue the trust fund which had been paid by King to Mitchell, the attorney, and by him to Franklin, the trustee, and by the latter had been turned over to Gartrell, his successor. Whether all or either

of the parties who had received the trust fund in Confederate money, had done so in bad faith, so as to make them all or any of them liable to the complainant, was the question to be decided under the evidence, and if liable at all, what was the extent of their liability, either jointly or separately, as the evidence might establish, according to the principles of law and equity, applicable to each one of them in the capacity in which they paid and received the fund; the parties received the fund from each other, and when a Court of equity gets jurisdiction of the parties through whose hand the trust fund has passed or been received, it will retain it for the purpose of making a complete and final decree so as to prevent a multiplicity of suits. The exception to ruling out the sayings of Mrs. King to Franklin, was, in our judgment, well taken. The witness proved her act in coming to him to go down to Rome to receive the Confederate money, but the Court refused to allow the witness to state her reasons for doing the act, made at the time. This was error. Although the acts and declarations of Mrs. King, in relation to the taking of Confederate money in payment of the trust debt, could not have been received to affect or prejudice the rights or interests of the minor children in that debt, still, her acts and declarations in relation thereto were competent to affect her own interest in that debt, and when the witness proved her act in coming to him to go down to Rome to receive the Confederate money, her reasons stated at the time for her act, should have been received as a part of the *res gestæ:* Code, 3720. The words "good faith," as contained in the request to charge, were in exact conformity with the ruling of this Court, when this case was before it at a former term, but the distinction between good faith and fraudulent, as applicable to the facts of the case, is too attenuated and shadowy to constitute a valid ground of error.

Let the judgment of the Court below granting a new trial be affirmed, with instructions as indicated in this opinion.



APPENDIX.

SUPREME COURT OF GEORGIA,

Atlanta, July 16th, 1872.

General TOOMBS having announced the death of the Honorable LINTON STEPHENS, a former member of this Court, the following order was passed:

It is ordered by the Court, that the Hon. ROBERT TOOMBS, Hon. CHARLES J. JENKINS, Hon. RICHARD F. LYON, Hon. IVERSON L. HARRIS, and the Hon. HENRY L. BENNING, be appointed a committee to report, when the Northern Circuit shall have been reached in its order on the docket, suitable resolutions commemorative of Judge STEPHENS. That these proceedings be entered upon the minutes, and that a copy thereof be sent to each member of the committee. It is further ordered that this Court stand adjourned until 10 o'clock A. M. to-morrow.

On October 5th, 1872, upon the call of the Northern Circuit, the committee reported as follows:

The Committee appointed by the Supreme Court of Georgia, during this term, to report "suitable resolutions commemorative of Judge STEPHENS," submit the following report:

The bench and bar of this Court are again called upon to hold a meeting of sorrow, commemorative of another of their most distinguished, valued and beloved professional brethren. The hand of death which has recently stricken the name of LINTON STEPHENS from the roll of the living, leaves not upon our records a more perfect model of a pure, able, learned and upright magistrate—of a just, profound, brilliant and successful lawyer—of an earnest, self-sacrificing, devoted patriot—of a great-hearted, true man, whose life was spent in the practice of virtue, the pursuit and vindication of truth, and in the service of his fellow-man.

LINTON STEPHENS was born in what was then Wilkes county, now the county of Taliaferro, in this State, on the 1st day of July, 1823. His father, of Scotch-Irish descent, was a gentleman of unusual education

and intellectual attainments in the day, and among the people among whom his lot was cast, and his family ranked with the first-class of the early settlers of our Commonwealth. He was left an orphan in his childhood, with a slender patrimony, but he had great advantages in his youth, of which he availed himself to an extent rare among the youth of our country. The providence which deprived him of a father's fostering protection committed him to the care of one pre-eminently qualified to discharge the duties of father, brother, protector and friend; deep, fervent, unbounded fraternal affection moulded that grand development of his moral and intellectual character which won the confidence, the affections and the admiration of all who knew him. Having been thoroughly prepared, under this training, he entered the Freshman Class of Franklin College, in the University of Georgia, in 1839, when sixteen years old; he was immediately recognized as the head of a large class of Georgia's chosen sons, which position he maintained throughout his collegiate course, and he graduated with the first honor of his *Alma Mater*, without a competitor and without a rival.

After leaving college, he was placed in the office of one of your committee to study law, and was soon afterwards sent to the University of Virginia, where he graduated at the head of the Law Class, under Judge TUCKER, who foresaw and foretold his great professional success. After graduating at the University of Virginia, in law, he went to Harvard, in Massachusetts, to attend the lectures of Judge STORY, of the Supreme Court of the United States, and remained there until Judge Story's death, when he came to Washington and spent a winter in attending the Supreme Court of the United States and the debates in Congress.

He returned to Georgia in 1846, having given three years to preparation for his profession, thoroughly prepared to bear the armor which he put on, and was admitted to the bar, in his native county, in 1846. He located at Crawfordville, in his native county, and became a leader of causes in the Court-house before he was scarcely known out of it. In 1849, he was elected to represent Taliaferro county in the Legislature: was re-elected in 1850 and 1851. Thoroughly versed in the principles of constitutional government, his compatriots immediately recognized his merit and his genius, and placed him at the posts of labor and of honor.

In 1852, he married the daughter of Judge JOSEPH THOMAS, of Sparta, and removed to Hancock county, and the next year the people of Hancock again called him into the public service as their representative in the Legislature, and continued to elect him until 1855, when he was a candidate for Congress, in a district opposed to his political opinions by a large majority, which his power and influence reduced to an extent which made his defeat a triumph for his principles. In 1857, he contested the same district, with the same honorable result.

In 1859, Judge STEPHENS was appointed to the Supreme Court of the State, and was unanimously elected by the Legislature to this honorable post, and after eighteen months' service in that position, resigned it on

account of ill health. We pass over his judicial record; it will pass down to future ages in our reports. His judgments were clear, concise, exhaustive expositions of the law and facts of the cases decided by him, and contain no word which his friends would wish to blot.

In 1860, he was elected to the Secession Convention of the State of Georgia, and voted against the resolution. He acknowledged the right, but opposed the policy of that resolve; but, after the resolution was passed, and that grand, historic act was accomplished, true to his principles and his allegiance to his State, he put his whole strength and power and soul into the cause of his country. He immediately returned to his home, raised a company for the vindication of the right, and joined the Fifteenth Regiment of Georgia Volunteers, and was elected Lieutenant Colonel of that regiment, went to Virginia to meet the foe, and continued in the army of Northern Virginia until 1862, when his health compelled him to retire from military service. Upon his return home, he was again called into the public service by the people of his county, who elected him to the Legislature in 1862, and continued him in that service until the end of the war. But when his State was invaded, in 1863, he raised a battalion of cavalry and again entered into military service for the defense of his native land, and served until the spring of 1864, when the term of service of his command expired, and soon after, in the spring of 1864, when the invader was devastating our land, he again put on his sword and stood in the front until compelled to retire, from ill health, to the duties of a legislator.

Having lost his first wife before the war, in 1868 Judge STEPHENS married Miss MARY W. SALTER, of Boston. From the surrender of our armies, in 1865, to the time of his death, (on the 14th of July, 1872,) Mr. STEPHENS was actively engaged in a very large and lucrative practice of his profession, and his last grand and successful effort was made in the vindication of public justice, and in the advocacy of the rights of the people.

His mind was peculiarly adapted to the profession which he selected, elevated and advanced, clear, vigorous, analytical and comprehensive, it seized truth, facts and law with an iron grasp, and stripped sophistry and error naked to the mental gaze of all beholders, while his stern integrity and devotion to truth gave irresistible power to his lofty intellect.

Judge STEPHENS was a husband and father, and here his genial, kind, affectionate nature shone with peculiar brilliancy, shedding happiness and joy over a household in which he was peculiarly blessed; but we forbear to enter those sacred precincts in which there is no human consolation.

The Committee offer the following resolutions:

Resolved, That, in the death of LINTON STEPHENS, the bench and bar of Georgia have lost an eminent jurist, and the country one of her best, ablest and truest sons, whose memory we would perpetuate for the benefit of future generations.

Resolved, That we respectfully tender to his bereaved widow and children the heartfelt sympathy of the bench and bar, and the officers of this Court, whose warm friendship and affection he so well deserved and so fully possessed.

Resolved, That in token of this, we will wear the usual badge of mourning during thirty days.

Resolved, That a copy of this report and resolutions be transmitted to Mrs. STEPHENS for the family, and that the Court be requested to have them entered on its minutes, and that the gazettes of the State be requested to publish them.

ROBERT TOOMBS,
CHARLES J. JENKINS,
RICHARD F. LYON,
IVERSON L. HARRIS,
HENRY L. BENNING,
Committee.

On motion, it is ordered that the report and resolutions be entered on the minutes of this Court, and that the Clerk do transmit to Mrs. STEPHENS a copy for the family of Judge STEPHENS.

Chief Justice WARNER, in behalf of the Court, responded as follows:

Judge STEPHENS, whose death we all so deeply mourn and regret, was no ordinary man. The records of this Court furnish the highest evidence of his eminent ability as a Judge and a lawyer. His strong, clear, discriminating, logical mind was wonderfully adapted to his chosen profession. The loss of such a man at any time, and especially at this time, is an irreparable loss to the bench, the bar, and to the entire people of his native State. Cut down in the full vigor and usefulness of his intellectual manhood, his place cannot be supplied.

Judge STEPHENS was not only a great man intellectually, but he was an honest and true man—true to his honor, true to his friends, true to his professional obligations, and true to his country. What a calamity to lose him from our midst here, whose voice has so recently animated and instructed us in the discharge of our official duties! But we must submit to the inscrutable dispensations of that Providence which controls the destiny of men and nations.

Cordially indorsing the sentiments expressed by the committee in their report and resolutions, let them be entered on the minutes of the Court, as a perpetual memorial of our affectionate regard for him when living, and of our heartfelt sorrow for our departed friend and brother, whose voice is now hushed in the silence of the grave.

SUPREME COURT OF GEORGIA,

Atlanta, October 5th, 1872.

The committee appointed to prepare resolutions commemorative of Judge CABANISS, reported through its Chairman, Col. N. J. HAMMOND, as follows:

Though the active professional life of Judge CABANISS was spent in the Flint Circuit, at the date of his death, (the 19th of April, 1872,) he resided in Atlanta, Georgia.

We, the undersigned, were appointed by the Atlanta bar as a committee to present a suitable memorial of his career and virtues to this Court. Messrs. ALEXANDER M. SPEER, R. P. TRIPPE, B. HILL, SAMUEL HALL, L. T. DOYAL, JOHN J. BEALL, and THOMAS HALL, as a committee of the Flint bar, presented such a memorial to the Superior Court of Upson county, in May, 1872. Finding that they intended presenting the same here, we agreed to join with them in reiterating their memorial here. It is as follows:

Change and decay are written upon every living thing beneath the sun. The loftiest intellect, the most spotless character, a heart moved by the kindest and noblest feelings of our nature, are all alike subject to those mutations and changes that are written by the hand of Destiny upon our race.

To the grave we go and bury from our sight the form in which once existed all those faculties of mind, emotions of the heart and graces of manner that endeared the living to our hearts, and there remains to us only their chronicled memory; and this soon passes with us into receding shadows of the past. Yet while we live, while the memory of departing friends linger with us, it is a sad yet melancholy pleasure to pause beside the tomb, and with surviving friends commune in sorrow at the loss we have sustained.

Good men die, and their bodies sleep in the earth to the morning of the resurrection, but for a time, at least, and upon the companions who move with them upon the stage of life, their good deeds, their spotless lives, their example upon the minds and hearts of survivors, shedding a gentle influence, falling like the unseen dew of the skies, bring joy and refreshment to our souls, as we journey over the arid wastes of life.

While toiling and struggling along the ways of life, its disappointments, its enjoyments and its jealousies, often dim and obscure to our mental visions those virtues and excellencies that often spring freshest in the modest and retiring nature; but when we stand by the opening tomb, and gaze into its dark and silent chambers; when we deposit there the lifeless form with which we have daily associated, envy, distrust and jeal-

ousy *wither* in our hearts, and we gaze with tearful eyes upon the dead, and read there the memory of virtues, which, in the broad glare of the world's sunshine, were only partially exposed to our view.

It is a trace of man's original purity that lingers in our fallen nature, that at the grave we bear no remembrance of the errors of theliving, but linger with speechless affection upon the virtues of the dead.

There gathers around the fearful mystery of the coffin and the grave only the cherished memory of our friend—of his worth, purity and usefulness; of our loss; of his gain; of our weary pilgrimage; of his triumphant and happy ascension; of our toils, disappointments and sorrows while yet journeying life's weary way; of his rest and peace "in green pastures and by the side of still waters."

Our professional brother and associate had spent a large portion of his life in the pursuits in which we are now engaged. With that diffidence and modesty that peculiarly distinguish him, he could not have hoped to attain eminence in his profession, unless he had other qualities of head and heart to overcome all such obstacles.

A clear and discriminating mind, a sound and well-balanced judgment, trained and matured by discipline, and a character of spotless purity, were the weapons with which he fought the battle of life. They slowly but surely attained for him success, honors and distinction, though diffident almost to a fault, for this cause rarely impressing audiences or Courts with the power of the forum. Yet there were in his efforts a precision and clearness, a force and candor, that often bore off the prize from the more gifted advocate. As the presiding Judge of the Flint Circuit, for four years (chosen by the people over whom he presided) his unfailing attention to the duties of his position, his quiet, unimpassioned, yet dignified administration of the law, his patient and courteous deportment upon the bench to the bar and people, his clear and lucid opinions of the law, receiving, as they often did, the highest encomiums of the Supreme Court—will long be remembered among those whom duty called into his Courts, and be treasured to his memory upon the unfading records of our judicial history.

But this life of usefulness would have been incomplete to have been limited alone to pursuits in which he received the benefit. He was not unmindful of his duty to his State, or that at the call of his fellow-citizens he owed a service that he could not disregard.

It would not be expected in a brief tribute such as is offered here, we should trace his public career through the various prominent and useful public positions that the confidence of the people conferred upon him. He filled them all "worthily and well," and left them without distrust of his capacity or suspicion of his integrity.

A man of marked modesty and diffidence; slow in forming acquaintances; with no adventitious aids of fortune or influential friends to press him forward in early life; with no recommendation but a clear intellect an honest heart and spotless life, few men in Georgia exercised a wider

influence, none commanded more justly or more worthily the universal confidence of our people at his death. But men live not alone in public life, wielding the power and patronage of position, or in the Courts amid the jostling and contests of contending suitors. There is a large portion of life due, and justly due, to family and friends, to the kindnesses and amenities of social and domestic life. Without them the picture, though never so brilliant, would be wanting in those delicate tints and tracings, those lights and shadows which dim not the glory but add new charm and beauty to the living canvass.

His modesty and diffidence may have been obstacles to his rapid advance to public favor, but around the fireside in the sweet charm of the domestic circle, they breathed a gentle and kindly influence that reached every heart, and are impressed in the life and manners of many who were nurtured and trained at his hearthstone.

Here it was that his best and happiest influences were felt and appreciated. Around him here clustered wife and children, to him the richest treasure of life. But into this bereaved and sacred circle of duty and affection we forbear to intrude. In the home seclusion of their irreparable loss, we can say there is only one source of consolation, a fountain that never fails, to which he as husband and father for so many years, pointed them and "led the way."

Probably no citizen of our State was ever honored and trusted more constantly with public confidence than our deceased professional brother. He was born in Greene county, in the year 1803. Losing his father in his childhood, his training and education was entrusted to his guardian, who gave him the best educational advantages that a new and rapidly improving country afforded. He was prepared for Yale College, but never joined this institution, determining to attend a course of law lectures at Harvard in its stead. Returning to Georgia for a year or two, he taught school, completed his legal studies, was admitted to the bar, and was about this time married to Miss Sarah Shipman, who still survives him, and who proved a joy and light to his household for nearly fifty years of wedded happiness.

About the year 1825 or 1826, he settled Forsyth, Monroe county. Soon after he was elected Clerk of the Superior Court of the county—a position both of honor and profit. This position he held with the confidence of the people for nearly a quarter of a century, and during most of the time acting also as Clerk of the Court of Ordinary. The perfect records of those Courts are the best evidences of his integrity and fidelity in official life. In 1832 and 1839 he was a member of the Conventions of the State, whose labor and results made a marked impression upon the political history of our State.

In 1840 he was chosen Clerk of the House of Representatives. In 1850 the Court of Ordinary, as at present organized, was established and he was chosen its presiding Judge until 1857, when the people called him to the Judgeship of the Flint Circuit, over which he presided for four

years. In 1861 and 1862 he was chosen and served as a Representative in our State Legislature.

During the war he was appointed Confederate States Collector of the State, and though millions of public money passed through his hands, he retired from his office far poorer in worldly goods than when he entered it. In 1865 he was a member of the Convention called to reorganize and establish civil government in Georgia. Soon after he was chosen with great unanimity a member of Congress from the district in which he lived. No members fromGeorgia at this time being admitted into Congress, he devoted himself anew to his profession until 1871, when he was elected Auditor of the State Road, which position he was filling at the time of his death. Here his career ended, and in the seventieth year of his age, quietly and calmly, he surrendered life, and passed, as we trust, to his reward on high.

He died and made no sign. Yet his life of piety and fidelity to duty is an assurance to bereaved hearts that he has passed into the climes of eternal bliss. Be it therefore,

Resolved, That in the recent death of the Hon. E. G. CABANISS, we have lost an honored and distinguished member of our profession; the State, an active, useful and patriotic citizen; the church of which he was a member a zealous, pure hearted christian; society one of its most highly cherished ornaments; and his family a husband and father whose loss they alone truly appreciate in all its results.

Resolved, That we sympathize and lament with his family and surviving friends the loss of our professional brother, in this their sad bereavement, and that a copy of the foregoing report and resolutions be furnished the family of our deceased brother by the Clerk of this Court, and be entered upon the minutes of this Court, and published in the papers of this city.

N. J. HAMMOND,
L. E. BLECKLEY,
L. J. GARTRELL.
Committee.

Judge MCCAY responded, in behalf of the Court, as follows:

At the request of the Chief Justice, who has just made a response for the Court to the resolutions upon the death of our lamented brother STEPHENS, I, in behalf of the Court, say of Judge CABANISS, that an acquaintance of twenty years enables me to say, there is not a jot or tittle of the resolutions which have been presented in which all who knew him do not heartily concur. He was a laborious, accurate and faithful man. With but few of the advantages usually enjoyed by successful men, he won for himself high distinction as a lawyer, and great influence in the State. Sound sense, clear discrimination and great intensity of conviction, seem to me to have been his marked characteristics as a lawyer and a Judge. As a man, he was without reproach. Of the highest in-

tegrity, full of charity for all, cheerful, benevolent, kind, he has left behind him a record that all of us may emulate. In all the qualities that go to make up a good reputation, our brother was a marked man. Respected and trusted by his fellow-citizens, loved by all who came closely in contact with him, he filled a place in society that but few can supply. Capable himself of strong friendship, he begot in others a similar emotion, and as he grew in years and rose in position, they clung to him with a devotion that never faltered. Of that gentle, affectionate, loving heart, that rendered him so perfect a husband and father, and created around his hearthstone a circle of love and devotion, it does not become me to speak. His death has broken the circle, but the love, the truthfulness, the gentleness of its centre, will ever follow as a precious memento, each of its parts.

It is a notable fact, and one of which our profession may justly be proud, that while each of the deceased brethren whose death we commemorate were men of mark in the State, of singular talents and learning, the great leading, striking characteristic of both was a high integrity—an unbending devotion to right. As it is a matter of which, as a profession, we may boast, may I not say that the good name each of them has left behind encourages all of us to emulate their example.

Ordered, that the memorial and accompanying resolutions, commemorative of the Hon. E. G. CABANISS, be spread upon the Minutes of this Court.

Memorial proceedings on the death of MARTIN ARNOLD, Esq., at the April Adjourned Term, Fulton Superior Court, August 30th, 1872.

The undersigned committee, appointed at a recent session of the bar of the Atlanta Circuit, have the sad duty upon them of declaring here solemnly in this place, the death of our beloved brother, MARTIN ARNOLD, Esq., of the Atlanta Circuit. A companion and friend, whose abilities and virtues invoked our admiration, our love, he is gone from our midst; and our hearts are extremely sad, as we look upon the place he filled, at his fireside, in this community, before this bar, now vacant.

Death discriminates in favor of no age, nor condition, nor talent, nor rank. The king, in the plenitude of his power, in the uncovered presence of cringing courtiers, while nations venerate and subjects shout, his majesty, shattered, trembles, sinks to the earth, and mingles his ashes in common mould with peasant dust. The "gloom of the valley and the shadow" penetrates the prison cage of the raving maniac, and stills his incoherent

ravings; thence pursuing its way, falls with equal weight of paralysis on the princely mind of him who stands foremost in the nation's file of genius. Death strikes down the ploughman, in the midst of his clods; the wealthy, in the height of their luxuriance and ease, succumb to the blow of the unseen arm. Death lays its leaden finger on the smiling lips of the sleeping child. His solemn *fiat*, "Dust to dust, ashes to ashes," sounds on the fitful slumber of wrinkled age. To all alike, his message comes—

"Dust thou art,
To dust returnest."

To our brother ARNOLD, in the contentment of home, in the devotion of family and friends, in the prime of manhood, in the possession of tried abilities, and growing success, with naught behind him to regret, or in the present to pain, or in the future to alarm, the message came, sudden (for it is always sudden), startling, imperative. With manly fortitude he heard it, and passed from our sight.

MARTIN ARNOLD was born in the State of New York, in or about the year 1832, and there spent his youth unto majority. He was the recipient of liberal opportunities of education, and the way in which he employed them, as well as the habits of industry then formed, is amply evinced in the accuracy and precision of his intellect, and his diligent, laborious application; qualities in him open to the most casual observer. He removed to the South, and to our own State, in or about the year 1853, and engaged himself, for a year or more, in the honorable avocation of teaching school. Thence he removed to Jonesboro, where he won golden opinions as a humane, skillful and thorough teacher. Along with his pursuit as a teacher, he applied himself to the study of the law, with Colonel JAMES F. JOHNSON as his preceptor, and was admitted to the bar about the year 1856. After his admission to the bar, he ceased to teach school, and became a partner with Colonel JOHNSON, in the practice of the law. The beginning of the war found him at Jonesboro, wedded to his profession. But he did not hesitate about his duty, in that exciting day. Although he was not born in the South, his sympathies were with the land of his adoption, and his earnest patriotism called him early to the field. He enlisted as a private, in the "Benjamin Infantry," the first company sent from Clayton county, and which company became a member of the Tenth Georgia Regiment. The contest ended, and the country needing his services no longer in the field, he returned to Jonesboro', and immediately resumed the practice of the law. From Jonesboro' he removed, in 1867, to Atlanta, where he was known and loved in his private character, and honored in his profession until the day of his death.

He was not brilliant, but patient and painstaking in an unusual degree. His continuity of thought was remarkable. Having commenced the investigation of a question, he permitted nothing to delay or divert him, but drove straight home to a conclusion, which was sure to be clear, accurate and just. The characteristic trait of our brother ARNOLD'S mind,

and virtues which appeared in his every business transaction, were readiness and accuracy. Everything he knew was instantly available. This was true of him to the very day of his death, though disease had long preyed upon his frame; and one might readily suppose, in view of his pale, earnest face and thin, slight figure, that weakness would diminish his energy or abate his zeal in legal research.

He was specially devoted to the study and practice of the Bankrupt Law, and here, too, was his peculiar strength. In this branch he was the peer of any member of our bar.

Brother ARNOLD was an upright, pure man. His conduct was well regulated because his heart was right. Quiet, unobtrusive; an unassuming, kind gentlemen; his gentle, amiable bearing won for him an enviable place in the hearts of all who knew him. He was somewhat bent in form—of exceeding slight figure—his face pale, but expressive and prepossessing in every lineament—was notably neat in his attire at all times. His manners, springing out of a benevolent disposition and a warm and generous emotional nature, were invariably affable and courteous. He was a devoted husband and father, and the shadow of his tomb falls upon a stricken wife, and a sweet child too young to be conscious of its great, irreparable loss. This community, the bar of the Atlanta Circuit, his family, can ill-afford to lose him from their midst. In the death of such a man, it becomes us to declare our grief; and the burthened heart naturally seeks a channel of expression for its suffering and sympathy. Therefore, the committee beg leave to submit the following resolutions:

WHEREAS, It has pleased Almighty God, in the exercise of his inscrutable wisdom, to remove from our midst our companion and friend, MARTIN ARNOLD,

Resolved, That in the death of MARTIN ARNOLD, a pure, earnest, true-hearted man, a learned and able lawyer, a generous, amiable friend, and an affectionate husband and father has fallen.

Resolved, That we extend to the bereaved family our unaffected, deep sympathy for the loss which they, as well as the community, and the bar of the Atlanta Circuit have sustained.

Resolved, That this report and these resolutions be entered upon the minutes of the Court, and that the Clerk furnish a copy of the same to the family of our deceased brother, and that the Chairman of this Committee report these proceedings to the Supreme Court upon the call therein of the docket of the Atlanta Circuit.

JNO. D. POPE,
S. S. FEARS,
CINCINNATUS PEEPLES,
JNO. MILLEDGE,
HOWARD VAN EPPS.
Committee.

It is ordered by the Court that the foregoing be spread upon the Minutes of Fulton Superior Court.

JOHN L. HOPKINS,
Judge Superior Court, Atlanta Circuit.

SUPREME COURT OF GEORGIA,
Atlanta, September 19th, 1872.

Upon motion of Howard Van Epps, Esq., the Court ordered that the preceding memorial, commemorative of MARTIN ARNOLD, Esq., be spread upon the Minutes.

INDEX.

[The head-notes except those followed by (R.) were made by the Judges.]

ABATEMENT. See *Judgments*, 4.

ABSENCE OF COUNSEL. See *New Trial*, 2.

ACCESSORY. See *Criminal Law*, 8, 12, 13, 37.

ADMINISTRATORS AND EXECUTORS.

1. When an administrator of an estate pays over to A one of the distributees and her children, A's distributive share, dividing it equally between them, under the misapprehension that the children were entitled to participate in the fund, it is a *devastavit* as to the amount paid the children. *Davis vs. Bagley et al.*..... 108

2. Where one of the executors of a will to which a caveat has been filed married the sister of the wife of one of the Judges of the Supreme Court, said Judge is not disqualified from presiding by reason of relationship by affinity to said executor, upon the trial of said cause before the Supreme Court. (R.) *Deupree, et al., vs. Deupree et al.*..... 414

3. The executor having renounced in writing as executor of the will to the Ordinary, which renunciation had been entered of record before qualification as executor and during the pendency of a caveat to the probate of said will, such renunciation was binding on the executor, and the Ordinary was the proper officer to determine whether he had any of the assets of the estate in his hands, not accounted for at the time of such renunciation. (R.) *Ibid.*

4. The legal presumption is, that the Ordinary performed his duty in regard to the protection of the assets of the estate before accepting the renunciation of one of the executors nominated in the will. (R.) *Ibid.*

5. Where there was a settlement between one of the executors of an estate and the legatees, in which there was turned over to the legatees a note of the executor, with a third party as security, as a part of the assets of the estate, and at the same time the executor gave to the legatees his individual note for the balance in his hands, and there was a distinct understanding that the last note was only given as evidence of the amount due, and that the executor was to be liable as executor for the amount of the same:

Held, That the last note was still a trust debt and entitled to priority in the distribution of assets, but the first was not. *Latimer vs. Sayre et al*..... 468

6. When one executor, having money in hand, loans it to another executor, taking his individual note for it and in a settlement with the legatees, they take from the executor loaning the money the note as assets, giving him a full discharge and acquittance of all liability:

Held, That the note thus turned over is not a trust debt as against the maker of the note, and his statement that it shall be so considered does not make it such as to give it priority over other debts in the distribution of the estate of the maker of the note. *Ibid.*

7. When Woolfolk executed a lease to Horne of a part of a city lot for the term of ten years, and subsequently Woolfolk, being the owner in fee of the whole lot, executed another lease of the whole lot to Mason & Dibble for the term of ten years, subject to the lien and incumbrance of the prior lease made to Horne:

Held, That the execution of the second lease of the whole lot to Mason & Dibble, subject to the lien and incumbrance of the prior lease made to Horne for a part of the lot, without more, did not make Woolfolk an executor *de son tort*, and liable to the heir-at-law of Horne, although the second lease was executed to Mason & Dibble after the death of Horne. *Horne vs. Woolfolk et al*..... 546

8. A sale of land of a testator or intestate by the executor or administrator, in the manner prescribed by law, where the estate is insolvent, divests the liens of judgments obtained in the lifetime of the testator or intestate, and the creditor must look to the proceeds in the

hands of the representative of the estate. *Sims vs. Ferrill*..... 585

9. When a judgment was rendered against the defendants, as administrators, and the Clerk issued an execution thereon, in favor of the plaintiff, commanding the sheriff to make the money due on the judgment of the goods and chattles, lands and tenements of the intestate, in the hands of the administrators, and in default thereof, of the goods and chattels, lands and tenements of the administrators, in their individual capacity:

Held, That the execution so issued was illegal, on the statement of facts disclosed by the record. *Horn, et al., vs. Bird*..... 610

10. While an administrator *de bonis non* has power to call upon the representatives of his deceased predecessor to account to him, the heirs-at-law and creditors have also the same right upon a proper case made, but if the administrator *de bonis non* fails so to do, the heirs and creditors of the first intestate cannot sue the administrator *de bonis non* for this failure, unless they show that he knew of the *devastavit*, and was guilty of some special neglect, not equally chargeable upon themselves. *Bowers et al., vs. Grimes et al*..... 616

ADMISSION. See *Corporation*, 4.

ALTERATION. See *Presumptions*, 4.

AMENDMENT.

1. In a joint suit against two, even after a plea in abatement by one of misjoinder, the plaintiff may discontinue as to one, and if his proof sustains his action, as amended, he may recover against one alone. *McArdle vs. Bullock & Radcliff*..... 89

2. Where A sues "as guardian of the minors" of B, on a contract originating before June, 1865, he is entitled to amend his declaration by alleging that the note sued on is the property of C, one of the minors, and that she is still a minor, and if he prove the allegation, it will excuse the filing of the affidavit required by the second section of the Relief Act of 1870. *Johnson vs Little et al*..... 106

3. When, after a judgment had been signed and execution issued, and several years had elapsed, a motion was made to put upon the minutes of the Superior Court the verdict of the jury in the case, which did not appear on the minutes, and it appeared that there was a verdict, in writing, signed by the foreman of the jury of the proper term, and an entry upon the Judge's docket, in his own hand, of "verdict" in the case:

Held, That there was sufficient in the record to authorize the amendment.

Held, That in granting the amendment the order should be so framed as that it should work no harm to any defenses to the judgment which any of the parties to the motion might have, growing out of the failure of the plaintiff to have his verdict entered at the proper time. *Woolfolk et al. vs. Gunn*..... 11

4. A bill in equity may be amended when the *remittitur* from this Court is about to be made the judgment of the Court below, and before it is entered on the minutes of that Court. *King vs. King et al*..... 19

5. An amendment to a former proceeding, had before the Ordinary, by an order *nunc pro tunc*, will only be allowed on petition, in writing, and notice to the opposite party in interest. (R.) *Fischesser vs. Thompson*..... 559

6. When Young applied for a homestead, as the head of a family, and, on an appeal from the Court of Ordinary to the Superior Court, a verdict was found against him, on the ground that he was not the head of a family. Afterwards, he made a second application for homestead, on the same land, as the head of a family, which was allowed by the Ordinary, and an appeal was taken to the Superior Court. When the case was called in the Superior Court, a motion was made to dismiss the application, on the ground that the applicant's right to a homestead had been adjudicated. The applicant made a motion to amend his petition for homestead by inserting a new right of homestead which had accrued since the former verdict and judgment, but which was not included in his petition to the Ordinary. The Court refused to allow the amendment, and dismissed the application:

Held, That the Court erred in refusing to allow the amendment and dismissing the petitioner's application without a hearing of the same. *Young vs. Brown*..... 552

7. When a judgment was rendered against the defendants, as administrators, and the Clerk issued an execution thereon, in favor of the plaintiff, commanding the sheriff to make the money due on the judgment of the goods and chattels, lands and tenements of the intestate, in the hands of the administrators, and in default thereof, of the goods and chattels, lands and tenements of the administrators, in their individual capacity:

Held, That the execution so issued was illegal, on the statement of facts disclosed by the record:

Held, That the affidavit of illegality was amendable on the motion made therefor by the defendant. *Horn et al., vs. Bird*..... 610

APPEAL.

1. A defendant who has appealed, had no right to withdraw his appeal, without the consent of the plaintiff. *Tommey & Stuart vs. Finney*... 155

2. Any party at interest who is dissatisfied with a judgment of the Ordinary, may appeal to the Superior Court on payment of costs and giving security for future costs, except in a case involving the removal of an administrator, etc., and this right of appeal on terms indicated extends also to cases where the Ordinary has given judgment for money against an administrator, or guardian under a citation for a settlement, as provided by section 1830 of the Revised Code. *Hobbs vs. Cody*..... 478

APPRENTICE. See *Habeas Corpus*, 1, 2.

APPROPRIATION OF PAYMENTS.

See *Factors*, 3.

ASSIGNMENTS.

1. An assignment by one insolvent at the time, to one creditor, to the exclusion of others, and providing for a return of the surplus, after paying the debt to

the assignor, is not, since the Act of 1866, in this State, fraudulent upon its face as to other creditors, and a bill alleging no other facts, but merely charging that the said assignment was intended to defraud and delay another creditor, but stating no other facts indicating fraud, is demurrable for want of equity. *Rowland vs. Coleman et al*..... 204

ATTACHMENTS.

1. Where an attachment was sued out, returnable by law, to 1120th District, Georgia Militia, and the bond, so recited, but the magistrate, by mistake, made the attachment returnable to the 919th District Georgia Militia:

Held, That if the levying officer, in fact, returned the papers to the proper district, to-wit: the 1120th, and judgment was then entered up on the attachment, the judgment was not void, and an affidavit of illegality, setting up these facts, was properly overruled. *Blake vs. Camp*..... 298

ATTORNEYS AT LAW.

1. The lien of an attorney-at-law attaches, for his fees, upon all property recovered by his services, and is superior to all other liens thereon. *Morrison, Heard & Co., vs. Ponder et al*..... 167

2. Where an attorney was employed by an executrix to aid her in winding up and settling an estate, an action for his fee will not lie till twelve months after the qualification of the executrix, that being the shortest time allowed for closing up an administration; nor can he recover one-half of his fee in such case, as a retainer under the 441st section of the Code. (R.) *Fry vs. Lofton*..... 171

3. An attorney cannot recover for professional services without proof of their value. *Ibid.*

4. If one of the council makes marginal marks on a paper which goes out with the jury to direct himself in argument, it is no error in the Court to refuse to compel him to rub them out before the paper goes to the jury—it not appearing that those marks conveyed any idea affecting the merits of the case. *Simms vs. Ferrill*..... 585

5. Where a bill was seeking to pursue a trust fund which had been paid by K. to M., the attorney, by him to F., the trustee for complainant, and by him had been turned over to G., his successor, said fund being in Confederate money; and the questions in controversy were whether all or either of the parties who had received the Confederate money, had done so in bad faith, so as to make them all or any of them liable to complainant, it was error to dismiss the defendants, F. and H. the administrator of G., as not being proper parties. (R.) *King vs. King et al*..... 644

BANKRUPTCY. See *Practice*, 5.

BASTARDS.

See *Distribution of Estates*, 7, 8.
" *Criminal Law*, 18.

BILL OF EXCEPTIONS.

1. If the evidence is material to an understanding of the errors complained of, the Judge should not certify a bill of exceptions which contains no version of the evidence. (R.) *Coleman vs. Johnson*..... 317

2. If the Judge refuses to certify a bill of exceptions, he should *then* be asked to indorse upon it his reasons for refusal, and if he will not, the matter should be *then* brought to the notice of this Court. The complaint cannot be made after thirty days from said refusal have elapsed. (R.) *Ibid.*

3. The Circuit Judge, having in his certificate attached to the original bill of exceptions and presented with the petition for *mandamus* to the Supreme Court, stated his reasons for failing to certify and sign the same, a *mandamus nisi* is not necessary. (R.) *Dougherty vs. Harvey*..... 618

4. The Court, not being clear from the record and the bill of exceptions, that the dissolution of injunction complained of was not a final disposition of the cause, so far as the injunction is concerned, will direct the bill of exceptions to be signed, though presented more than fifteen days after the judgment complained of. (R.) *Ibid.*

See *Practice in Supreme Court.*

CARRIERS.

1. This case must be controlled by that of the *Southern Express Company vs. Shea*, 38 Georgia, 519, in which it is laid down that, "when a common-carrier receives and receipts for goods, to be transported beyond the terminus of his own line, he undertakes to transport the goods to the point of destination, either by himself or competent agents, and if the goods are lost beyond the terminus of his own line, he will be liable therefor." *Cohen & Menko vs. Southern Express Co.*. 148

2. The owner of goods cannot hold such agents liable on the contract of bailment. *Ibid.*

3. When a railroad company, by its agents, takes the fare of a passenger to a particular station on its road, it is bound to stop at that station, that he may get off the cars; it is not sufficient that the speed of the cars is slackened. And if, after passing the station, the speed of the cars is again slackened, that the passenger may get off, and, under the direction of the conductor, he does get off, and in so doing gets injured, the company is liable. It is not want of ordinary care, if a passenger prudently uses the means which the company affords him to get off the train. *The Georgia R. R. & Banking Co. vs. McCurdy*..... 288

4. The jury are the proper judges of the *quantum* of damages in an action on the case against a railroad company for injuries received by passengers, and this Court will not overrule the Judge below in refusing a new trial for excessive damage, unless the excess be manifest and gross. *Ibid.*

5. In a suit against a common-carrier for the loss of a trunk, there being evidence going to show that the shipper placed a value upon the trunk, at the time of shipment, much less than the amount of the verdict in favor of the plaintiff, a new trial will not be granted at his instance, especially where, on looking to the whole record, the verdict is not so decidedly against the weight of evidence as to warrant the Court in setting it aside. *Green vs. Southern Express Co*..... 305

6. If a shipper declines to state the value of goods when asked by the carrier, it is questionable whether he can recover of the carrier. (R.) *Ibid.*

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CAVEAT TO WILLS. See *Wills*, 1, 2, 3, 4.

CERTIORARI.

1. The Superior Court has jurisdiction to correct errors by a writ of *certiorari* to the judgment of the Ordinary, allowing a homestead under the provisions of the seventh section of the Homestead Act of 1868. *Lathrop vs. The Soldiers' L. & B. Association*..... 483

CHARGE OF THE COURT.

1. A charge not warranted by the evidence is error. *Davis vs. Bagley et al*..... 108
2. Where a charge is asked, which some of the testimony warrants, it should be given, although such tes-

timony may be in conflict with other evidence in the case. *Davis vs. Banks et al.*..... 138

3. The verdict was not set aside, though there was an error in the charge of the Court. (R.) *Humphreys vs. The State*..... 190

4. It is not error in the Court to say to the jury that in common parlance the word "heirs" means children, where he gives the legal meaning at the same time. *Burge et al. vs. Burge*..... 301

5. Where, in a criminal case, the Court charges the jury, "it is my opinion that you can infer from Grant's [the defendant's] admission, that the pistol which he shot had a ball in it, inasmuch as he undertook to point out the place where the ball struck, whether that was the place or not," this Court is required by Revised Code, section 3183, to grant a new trial. *Grant vs. The State*..... 477

CHEAT AND SWINDLER.

See *Criminal Law*, 17.

CLAIMS.

1. A levy of a mortgage *fi. fa.* on personal property, more than sufficient in value to pay it off, is *prima facie* a satisfaction. The fact that a large portion of such property was applied by plaintiff and defendant in *fi. fa.*, by way of compromise of the claims of other creditors of defendant, will not affect the right of contesting creditors or claimants to have the *fi. fa.* credited, so far as their rights are concerned, with the value of all the property levied on. *Chisholm vs. Chittenden & Company*..... 213

2. Such contesting creditors and claimants are entitled to have the *fi. fa.* credited with the value of the property at the time of levy. Subsequent depreciation, arising from the unskillful handling of the goods (by parties other than the contesting creditors or claimants) while under the control of the sheriff or plaintiff, should not be deducted from the amount to be credited on the *fi. fa.* *Ibid.*

3. Under the usual issue formed in a claim case, it is not competent for the plaintiff in *fi. fa.* to have an ac-

counting between the claimant and the defendant in *fi. fa.*, and to have the verdict so moulded as to subject to his debt any amount which might be found in the hands of the claimant, belonging to the defendant, even where such sum may have been paid by defendant to claimant, in part payment for an amount of goods (a part of which are the subject-matter of controversy), which had been sold by claimant to defendant, but which sale claimant had elected to rescind, because of false representations by defendant, at the time of sale; especially when the claimant, on his election to rescind the contract, tendered the money received by him to defendant in *fi. fa.*, and which the latter refused. If the plaintiff desires to have such amount subjected to his execution, he must so frame his pleadings as to put the claimant upon notice. *Ibid.*

4. False representations made by defendant in *fi. fa.* to claimant, in reference to his pecuniary condition, to induce the claimant to sell him the goods in controversy on credit, are admissible, on the trial of the claim case, to show the contract of sale void, on account of misrepresentation of a material fact. *Ibid.*

5. Where claimants were deceived by such misrepresentation, and gave credit to the defendant in *fi. fa.*, on the faith of it, that vitiates the sale, if they elect so to do. *Ibid.*

6. If the defendant in *fi. fa.* obtained possession of the goods, under such circumstances, and added them to a stock of goods already mortgaged, the lien of the mortgage will not attach to such goods to the exclusion of the claim of the seller, who elects to rescind the contract of sale, no new consideration having passed from the mortgagee to the mortgagor, at the time of such addition to the mortgaged stock. *Ibid.*

7. Where such defect appears on the face of the proceedings, and the *fi. fa.* has issued, and been levied on the mill, and a claim interposed, the claimant, on the trial of the claim case, may take advantage of such defect, by objection to the affidavit, judgment and *fi. fa.*, when offered in evidence. *Phillips vs. Hyde*..... 220

8. Where the affidavit fails to state the time the debt fell due, and plaintiff in *fi. fa.* is offered as a witness to prove that the consideration of the notes sued on was work and labor done on the mill, it is competent for claimant to ask him at what time he performed the work, as preliminary to proving that the debt had been due for more than a year. *Ibid.*

9. Whether a judgment of foreclosure of a mortgage bars a claimant under purchase from the mortgagor subsequent to the mortgage from setting up defenses which might have been made by the mortgagor, discussed. (R.) *Guerin vs. Danforth*..... 493

CODICIL. See *Wills*, 7.

CONFESSIONS. See *Criminal Law*, 3, 4, 7.

CONFIDENTIAL RELATION.

See *Equity*, 15, 16.

CONSIDERATION. See *Contracts*, 1, 2.

CONSPIRACY. See *Evidence*, 11.

CONSOLIDATING ACTIONS.

See *Practice*, 3, 9.

CONSTITUTIONAL LAW.

1. The Ordinance of 1865, suspending the Statutes of Limitations, was of force, *proprio vigore*, irrespective of any confirmation of it by the Convention of 1868. *Goodroe vs. Neal*..... 109

2. That clause of the third paragraph of the first section of Article II. of the Constitution of Georgia, which provides that "No session of the General Assembly, after the second under this Constitution, shall continue longer than forty days, unless prolonged by a vote of two-thirds of each branch thereof," applies only to the General Assembly which was to meet after the State government had been fully reconstructed under the so-called Reconstruction Acts of Congress, not to the Legislature of the provisional government

organized under those Acts. *Macon & Augusta R. R. Co. vs. Little and Johnson vs. Sayre et al* 370

3. The Supreme Court of the United States have said, in White *vs.* Hart *et al.*, *infra*, "The action of Congress upon the subject [the Reconstruction measures] cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it." While compelled to accept this dogma as law, and as perhaps true in a limited degree, so far as facts accomplished are concerned, as a general proposition I dissent from and protest against it. *Ibid.*

4. Under the recent decision of the Supreme Court of the United States, in the case of William White *vs.* John R. Hart and William D. Davis, decided December Term, 1871, we are compelled to hold, that the reconstructed provisional government of Georgia did not expire before June 12th, 1870, when Congress enacted that "the State of Georgia, having complied with the Reconstruction Acts, and the fourteenth and fifteenth amendments to the Constitution of the United States having been ratified in good faith by a legal Legislature of said State, it is hereby declared that the State of Georgia is entitled to representation in the Congress of the United States." Upon the admission of her Senators and Representatives, under that Act, says the Court, "the condonation by the national government became complete." The conclusion, to our minds, is inevitable, that up to the passage of that Act, at least, the provisional government provided for by the Act of March 2d, 1867, still existed. *Ibid.*

5. It follows that the session of the Legislature of 1870, which passed the Act of October 13th, of that year, was not a session of the General Assembly, after the second under the Constitution, in the sense in which the Convention of 1868 used these words. Hence, the Act under review is not invalid because passed by the Legislature more than forty days after the commencement of its session. *Ibid.*

6. It is at least doubtful whether the first four sections of the Relief Act of October 13th, 1870, prospective in their operation, as sound rules of construction re-

quire them to be understood, so far impair the remedy of contracts made prior to June, 1865, as to be unconstitutional under the tenth section of the first Article of the Constitution of the United States. It is, therefore, the duty of the Court to refuse to declare them unconstitutional. *Ibid.*

7. The first four sections of the Relief Act of October 13th, 1870, must be read in the light of the title to that Act, and in so far as they are not variant from it, they do not violate the fifth paragraph of the fourth section of Article III. of the Constitution of Georgia, and to that extent the Court should give them effect. Therefore, in all suits pending at the time of the passage of the Act, for debts founded on contracts made prior to June, 1865, the taxes must have been paid, and the affidavit filed within six months after the Act passed; and in all suits commenced after its passage, at the time of filing the writ, on pain of having the case dismissed on failure to do so. *Ibid.*

8. If Congress or a State Legislature pass a law, within the general scope of their constitutional power, the Courts cannot pronounce it void merely because, in their judgment, it is contrary to the principles of natural justice: Calder *vs.* Bull, 3 Dallas, 399. *Ibid.*

9. The seventeenth section of the fifth Article of the Constitution of 1868, which declares that "No Court or officer shall have, nor shall the General Assembly give jurisdiction to try, or give judgment on, or enforce any debt, the consideration of which was a slave or slaves, or the hire thereof," is in violation of the tenth section of the first Article of the Constitution of the United States, and is therefore null and void. *Mosely vs. Hogg* 599

10. The State has the same right of eminent domain over the streets and squares of Savannah, dedicated to the use of the inhabitants of the city, by Act of 1760, and those since laid out upon the common, dedicated by that Act to the same use, as it has over other territory of the State, and may lay an additional servitude upon such streets and squares, by granting to a corporation the right to run a street railway, whose cars are drawn by animal power through them, without the consent of the Mayor and Aldermen of the city.

The Savannah & T. R. R. Co. vs. The Mayor and Aldermen of Savannah..... 602

CONTINUANCES.

1. Where the sureties on a criminal bond, which has been escheated, and on which the usual *sci. fa.* was issued, offer, on a motion to enter up judgment on the bond, at the return term of the *sci. fa.*, to prove the principal is too sick to appear, they should be permitted to do so. The proof made, it would entitle them to a continuance. *Russell vs. The State*..... 9

2. Continuances are in the sound discretion of the Judge, and this Court will not interfere with that discretion, unless it has been abused, to the injury of the party complaining. *Gavan vs. Ellsworth*..... 283

3. Where, upon calling of a cause, a motion was made by the defendant to continue the same on the ground of the absence from providential cause of one of his counsel, who was also his son, and the defendant made affidavit that the absent counsel was the leading counsel, who had been entrusted with the entire charge of preparing and arranging the evidence, and with whom he had more free and full conferences than with any other counsel; that he could not safely go to trial without his presence; that the application was not made for delay; and the Court refused the continuance, and after a verdict for the plaintiff, it appeared on a motion for a new trial, that the defendant was seriously damaged by the absence of said counsel, in this that the counsel was in possession of a paper that would have been material evidence on the trial, by reason of the answers to a certain set of interrogatories opened upon the trial:

Held, That, in furtherence of the principles of justice and equity, a new trial ought to have been granted. *Thrasher vs. Anderson*..... 538

See *Criminal Law*, 10, 11, 12.

CONTRACTS.

1. Duress which will avoid a contract must consist of threats of bodily or other harm, or other means amounting to coercion, or tending to coerce the will

of another, and actually inducing him to do an act contrary to his free will. *Russell vs. McCarty et al...* 197

2. An executory contract for the sale of goods to be delivered at a future day, where both parties are aware that the seller expects to purchase himself to fulfill his contract, and no skill and labor or expense enters into the consideration, but the same is a pure speculation upon chances, is contrary to the policy of the law and can be enforced by neither party. But where such a contract is executed, an agent employed by his principal to make the contract can recover from him any money he may have advanced in the transaction by his authority, or without authority, if the principal, after such advance, ratify his agent's act in making it. *Warren, Lane & Co. vs. Hewitt*..... 501

CORPORATIONS.

1. Although a corporation, as such, can do no corporate act out of the limits of the State granting its charter, yet its agents and officers may bind it by contracts and engagements made in other States, and the minutes of its board of directors may be used as evidence of the acts of the board, even though the meetings of the board appear to have been held out of the State chartering the corporation. *The Wood H. H. Mining Co. vs. King*..... 34

2. It is a necessary incident of a mining corporation that it shall have power to contract and to bind itself to those dealing with it in matters within the intent of the charter, even though the charter contains no express or grant or power to contract or make debts. *Ibid.*

3. The directors of a corporation, unless expressly restrained either by the charter or the by-laws, may exercise the ordinary powers of the corporation. *Ibid.*

4. A corporation which, through its directors, accepts the services of another as treasurer, and ratifies and audits his accounts, in which a balance appears against the corporation, is bound by the admission, as a private person would be, under the same circumstances. *Ibid.*

5. When the treasurer of a corporation, with the knowledge and consent of the directors, raised money for the

use of the corporation, on his own credit, paying interest therefor above the legal rate, and his accounts, as treasurer, were audited and agreed to by the company, of extra interest appearing on the account, and a balance struck and agreed to as due the treasurer, a verdict of a jury for the balance with legal interest from the date of the account, is not illegal. *Ibid.*

COUNTY MATTERS.

1. The Ordinary of a county has no authority under any general law of this State, even with the recommendation of the grand jury of the county, to borrow money on the credit of the county, and if, for this purpose he issue county bonds and sell them, the county is not liable on the bonds so issued. *Dent vs. Cook, Ordinary, et al.*..... 323

2. On a proper case made by bill, in the name of the citizens of the county—tax payers—it is the duty of the Judge of the Superior Court, as Chancellor, to restrain, until the hearing on the merits, an Ordinary from ordering such bonds to be paid by the treasurer of the county: *Provided*, the injunction be so framed as not to interfere with the rights of bondholders who are not parties to the bill, to the use of every remedy allowed by law, through the Courts of law and equity, to test and enforce any claims they may set up against the county in the premises. *Ibid.*

3. The Act of October 30th, 1870, establishing a system of common schools and reorganizing the county board of education, taken in connection with the Constitution of 1868, abolishing the Inferior Court, and casting its duties upon the Ordinary, is a repeal by implication of section 378 of the Code, making the Ordinaries the treasurers of the boards of education of their respective counties. The treasurer of the county, and not the Ordinary, is now by law the treasurer of the board of education. *Clarke vs. Levy, Ordinary*..... 498

CRIMINAL LAW.

1. When, after the jury was stricken and before the cause was submitted to the jury on an indictment for a

misdemeanor, the defendant then first discovered that two of the jurors, not stricken, had been on the grand jury pending the bill of indictment:

Held, That the defendants had a right to a new jury list, with talesmen substituted for the two incompetent jurors, and was entitled to his seven strikes from that list. *Cobb vs. The State*..... 11

2. An indictment charging that the defendant had permitted A. B., a minor, to play or roll billiards on a table kept by him, without the consent of his parents, etc., is not demurrable, as in the alternative; the words play or roll are used in the statute as synonymous. *Ibid.*

3. Where on a trial for murder, it was proposed to prove certain statements of the prisoner confessing his guilt, made in jail to a fellow prisoner, and, on a preliminary examination, it appeared that the prisoner had, before these statements were made, written a letter to the Governor, indicating that the murder had been committed in pursuance of a conspiracy, and mentioning several names of persons as conspirators, and the Attorney General of the State, by authority of the Governor, had offered him a full pardon if he would disclose the whole, but it did not appear that he had made any disclosure, either to the Attorney General or Governor, but had promised to do so in writing, which written disclosure he had not made at the time he made the statements to his fellow prisoner:

Held, That it was not error in the Court to permit the statement thus made to go to the jury, it not appearing that they were made under any undue influence at the time, and there being nothing to show that the arrangement with the Attorney General had been acted on by the prisoner. *Holsenbake vs. The State*..... 43

4. The preliminary examination before the Court, to ascertain if confessions offered are, or are not voluntary, is properly conducted in the presence of the jury, and the confessions, when introduced, are to be passed upon by the jury, in all respects; the decisions of the Judge that they were voluntarily made being only *prima facie*. *Ibid.*

5. It is competent for the State to introduce evidence to contradict any facts stated by the prisoner in his state-

ment made before the jury, under the Act of 1869. *Ibid.*

6. A charge of the Court, that the jury must be *satisfied* that the defendant was insane before they can acquit him upon that ground, though, perhaps, too strongly stated, is not a ground for a new trial if there be no evidence of insanity before the jury. *Ibid.*

7. When, on a trial for murder, the confessions of the prisoner were in evidence before the jury, and the Judge, in his charge, told the jury that whilst they could not convict upon the confessions alone, uncorroborated by other evidence, yet, that, if it was proven that the person to whom the confession referred, was unlawfully killed, this was evidence of corroboration sufficient to authorize the jury, under the law, to convict on the confessions:

Held, That this was not error. *Ibid.*

8. The principal felon and an accessory before the fact may be jointly indicted in the same indictment with proper averments and charges against each. *Loyd vs. The State*..... 57

9. The form of an indictment, as prescribed by section 4535 of the Revised Code, need not be followed to the letter; it is sufficient if it be conformed to in all material particulars. *Ibid.*

10. On the calling of an indictment against a principal and accessory, the Court may require both to answer ready or not ready for trial; if they answer, and the principal be put on trial, it is not error to put the accessory on his trial at the same term of the Court after the conviction of the principal, without any new requirement to announce, unless it appear that some cause for a continuance has happened since the first calling of the case. *Ibid.*

11. It is no ground for a new trial that the Court refused to continue, because of the absence of one of the prisoner's counsel, on whom he principally relied, from sickness, the affidavit for continuance only saying that the affiant "had been informed by letter of the sickness;" especially if it appear that other competent counsel are employed and do appear in the trial. *Ibid.*

12. It is not a good ground, for the continuance of the case against an accessory before the fact, to show that the principal felon has been convicted, yet that he intends moving for a new trial. *Ibid.*

13. It is no ground of challenge against a juryman that he has formed and expressed an opinion, etc., upon one of the facts necessary to make out the charge against the prisoner, and it is not error in the Court to say, in the presence of the panel, that the formation and expression of an opinion as to the guilt or innocence of the principal in a crime, does not, of itself, render them incompetent to sit upon the trial of the accessory before the fact. *Ibid.*

14. It is not a ground for a new trial in a criminal case, that the Judge admitted, as evidence before the jury, the written report of a phonographer of the prisoner's statement before the magistrates at the summary hearing previous to the commitment, the report being sworn by the phonographer to be true, and the prisoner having full opportunity to examine him thereto before the jury; it further appearing that the statement was very immaterial, and that it took the prisoner four hours to make it. *Ibid.*

15. When a prisoner undertakes to make a statement before the jury, and he indulges in long, rambling statements of matters wholly immaterial to the matter in hand, so as to consume several hours, and yet says nothing pertinent to the issue before the Court, it is no ground for new trial for the Court to admonish him that he must confine his statement to matters bearing on the case. *Ibid.*

16. It is not error in the Court to charge the jury on the question of insanity, that if one has indulged his passions or blunted his moral sense, so that he can commit crime without remorse, and fails to see its heniousness, as persons of purer morals and more restrained passions see it, this does not make him insane. If he have sufficient capacity to discern right and wrong as to the particular act in question, if he has knowledge and consciousness that the act he is doing is wrong and would deserve punishment, he is of sound mind and memory, so as to be subject to punishment. *Ibid.*

17. Where A advances $20 to a laborer on a promise of the latter to work it out, and the laborer afterwards refuses to do so, he is not guilty of the offense of being a common cheat and swindler. *Ryan vs. The State*..... 128

18. When a defendant was arrested under a bastardy warrant, and gave bond and security to appear before a Justice of the Peace at a future day for the hearing of the accusation contained in the warrant:
Held, that the bond so given was a legal and valid bond. *Whitman et al. vs. Bullock, Governor*..... 173

19. When upon a review of the evidence and the entire record of the trial of the case, there is no materential error which could have produced a different result, a new trial will not be granted, especially where the verdict is sustained by the evidence. *Humphreys vs. The State*..... 190

20. The law of insanity, as laid down in Choice *vs.* The State, 31 Georgia Reports, pages 472, 475, 477 and 478, affirmed. (R.) *Ibid.*

21. The verdict was not set aside, though there was an error in the charge of the Court. (R.) *Ibid.*

22. When, on a trial for murder, it appeared that deceased had threatened prisoner's life, whereupon prisoner left the field where the quarrel took place, returned in about twenty minutes and said if deceased was going to whip him, he was now ready for him, and deceased advanced upon him, pistol in hand, upon which prisoner shot and killed deceased, and the jury returned a verdict of voluntary manslaughter, this Court will not disturb the verdict. *Jackson vs. The State*..... 198

23. Provocation by threats will, in no case, be sufficient to free the person killing from the crime of murder or from manslaughter, if the circumstances reduce the homicide to that grade. *Ibid.*

24. Where counsel for prisoner consents that the jury may return their verdict to the Clerk, it implies a consent that they may disperse after having done so; and if the verdict so returned is one for "manslaughter," not specifying the grade, it is not error in the Court to order the jury to reassemble and change

their verdict to either voluntary or involuntary manslaughter (and the jury do change it to voluntary manslaughter,) unless the prisoner can show that one or more of the jury have been tampered with or that his case has been otherwise prejudiced by reason of the dispersing of the jury. *Ibid.*

25. An opinion formed and expressed from hearsay as to the guilt of the accused does not disqualify a juror from trying the case. *Westmoreland vs. The State*... 225

26. It is no ground for challenge to the array that some of the jurors were summoned by a bailiff, in attendance upon the Court and under its direction, unless the defendant shows that he is in some way prejudiced thereby. *Ibid.*

27. That a witness did not hear all of a conversation of defendant about which he is called to testify, is no ground of objection to his stating so much of it as he did hear. *Ibid.*

28. The defendant cannot give in evidence his own sayings as to when a certain injury was inflicted upon him, and who inflicted it, made to his physician two or three days after the perpetration of the act for which he is indicted. *Ibid.*

29. It is not error in the Court to refuse to charge the jury that if they have a reasonable doubt as to the sanity of the prisoner, they should acquit, where he charges them, "If, after a careful survey of all the testimony, you have a reasonable doubt of the defendant's guilt, you will acquit him." *Ibid.*

30. A juror's affidavit will not be received to impeach his own verdict. *Ibid.*

31. Mere information to a jury that a bet has been made by a named person as to the result of their verdict, without more, is no ground for setting aside the verdict. *Ibid.*

32. Misconduct on the part of the jury, while they have the case under consideration, from which injury might have resulted to the defendant, throws the burden upon the State to show affirmatively that no such injury has resulted. In this case, the State has done so. *Ibid.*

33. The verdict, in this case, is not contrary to law nor the evidence; neither is the charge of the Court inapplicable to the facts. *Ibid.*

34. Where, in a criminal case, the Court charges the jury, "it is my opinion that you can infer from Grant's [the defendant's] admission, that the pistol which he shot had a ball in it, inasmuch as he undertook to point out the place where the ball struck, whether that was the place or not," this Court is required by Revised Code, section 3183, to grant a new trial. *Grant vs. The State* 477

35. In a murder trial, if the State prove by cross-examination of a witness for the defense, that "not a negro in the neighborhood was friendly to prisoner" (who was himself a negro) and the evidence of guilt rests solely upon the testimony of one witness, who was also unfriendly to prisoner, and the prisoner offer to prove the cause of his unpopularity, with his own race, he should be permitted to do so. *Durham vs. The State*..... 516

36. In an indictment against a magistrate for willfully and knowingly demanding more costs than he was entitled to by law, it is not sufficient as in ordinary cases to set forth the offense in the language of the Code. The indictment must, as the section creating the crime provides, "specially set forth the merits of the complaint," and is defective unless it specify the items of cost actually due as well as the amount demanded or received. *Oliveira vs. The State*..... 555

37. One who buys or receives goods, chattels, money or other effects that have been stolen, or feloniously taken from another, knowing the same to have been stolen, or feloniously taken, may be indicted as an "accessory after the fact," under the provisions of the 4420th section of the Code, that section creates and defines a distinct offense. *Bieber vs. The State*..... 569

DAMAGES. See *Measure of Damage*, 1, 2, 3, 4, 5.

DEDICATION.

1. When the owner of a tract of land lays it off for a town, publishes a map of the lots, streets and lanes,

and sells out the lots on a street to others, and the town is established as designated in the map, the owner of the land will be presumed to have dedicated the streets and lanes to the public, and if one of them be diverted from the purposes designated, as if under a sale from the city authorities, a house be built on land that is part of the street, this does not authorize the original owner of the tract to sue in ejectment for the land so built upon. The title of the land is in the public, for the uses designated, so long as the town exists. If the street be abandoned by the public, *prima facie*, the reversion would be in the owners of the abutting lots, unless the injured grantor had in express terms reserved the right to himself in his deed conveying the lots, or in his act of dedication. *Bayard vs. Hargrove et al*..... 342

DEED. See *Mortgage*, 5.

DE FACTO. See *Municipal Corporation*, 1.

DEMAND.

See *Relief Act of* 1870, 2.
" *Lien*, 4.

DILIGENCE. See *Carriers*, 3.

DISMISSAL OF SUIT.

See *Relief Act of* 1870, 22.

DISTRIBUTION OF ESTATES.

1. In this State a creditor cannot get a preferred lien on the assets of an estate, as against other creditors of equal degree, by getting the first judgment against the administrator. *Green vs. Allen et al*..... 205

2. The application of a widow to the Ordinary for her twelve months' support out of the estate of her deceased husband, should be made by petition, in writing, and notice given to the representative of the estate, if there be one, and the order of the Ordinary should always recite the names of the persons notified. *Fischesser vs. Thompson*..... 459

3. When a judgment of the Ordinary, allowing to a widow her twelve months' support, was presented in the Superior Court, claiming money as a debt of the highest dignity against the claim of a judgment creditor of the deceased, it was competent for such judgment creditor to attack the judgment of the Ordinary, and inasmuch as it was not recited in the order and judgment of the Ordinary that the representatives of the estate had been notified, and the provisions of the law had been complied with, the judgment of the Ordinary, allowing the widow her twelve months' support, was void, as against the judgment creditor of her deceased husband, who had no notice of her application through the legal representatives of his estate or otherwise. McCAY, Judge, dissenting. *Ibid.*

4. Where there was a settlement between one of the executors of an estate and the legatees, in which there was turned over to the legatees a note of the executor, with a third party as security, as a part of the assets of the estate, and at the same time the executor gave to the legatees his individual note for the balance in his hands, and there was a distinct understanding that the last note was only given as evidence of the amount due, and that the executor was to be liable, as executor, for the amount of the same:
Held, That the last note was still a trust debt, and entitled to priority in the distribution of assets, but the first was not. *Latimer vs. Sayre*..... 468

5. When one executor, having money in hand, loans it to another executor, taking his individual note for it, and in a settlement with the legatees, they take from the executor loaning the money the note as assets, giving him a full discharge and acquittance of all liability:
Held, That the note thus turned over is not a trust debt as against the maker of the note, and his statement that it shall be so considered, does not make it such as to give it priority over other debts in the distribution of the estate of the maker of the note. *Ibid.*

6. A widow dying within less time than one year after administration on the estate of her deceased husband, without having made her election to take a child's part of the real estate, in lieu of her dower, her ad-

ministrator is not entitled to receive or to recover such child's part after her death. *Wilson vs. Bell, adm'r.*. 514

7. Under the Act of 1816, illegitimate brothers and sisters, born of the same mother, and their representatives inherit from each other in the same manner as if born in lawful wedlock, and if, at the death of an intestate, the brothers and sisters be all dead, their children take *per capita*, and not *per stirpes*, just as do legitimates, under the same circumstances. *Houston et al. vs. Davidson et al.*..... 574

8. The Act of 1859, and the Code, section 2448, providing that representation among collaterals shall extend to the children and grand-children of brothers and sisters, extends also to distribution among the brothers and sisters of illegitimates and their representatives, but if all the brothers and sisters be dead, leaving children, and one of the nephews be also dead, leaving children, the division is still *per capita* among the nephews and nieces, the children of the deceased nephew or niece taking among themselves the share that would have fallen, under the *per capita* division, to their deceased parent. *Ibid.*

DISTRICT ATTORNEY.

It is not incumbent upon the District Attorney to follow cases from that Court into the Supreme Court. (R. See end of Report.) *Ryan vs. The State*..... 128

DOWER.

A widow dying within less time than one year after administration on the estate of her deceased husband, without having made her election to take a child's part of the real estate, in lieu of her dower, her administrator is not entitled to receive or to recover such child's part after her death. *Wilson et al. vs. Bell*..... 145

DURESS.

Duress which will avoid a contract must consist of threats of bodily or other harm, or other means amounting to coercion, or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will. *Russell vs. McCarty et al.*.. 197

EDUCATION.

The Act of October 30th, 1870, establishing a system of common schools and reorganizing the county boards of education, taken in connection with the Constitution of 1868, abolishing the Inferior Court, and casting its duties upon the Ordinary, is a repeal, by implication, of section 378 of the Code, making the Ordinaries the treasurers of the boards of education of their respective counties. The treasurer of the county, and not the Ordinary, is now, by law, the treasurer of the board of education. *Clarke vs. Levy, Ordinary* 498

EJECTMENT.

1. A defendant in ejectment may set up an equitable defense in his plea, but is not obliged to do so; he may file his bill if he prefer it. *Elder vs. Allison*..... 13

2. A defendant in ejectment may set up an equitable defense by way of plea in Georgia. *Allison vs. Elder*.. 17

3. Evidence which is relevant to the equity case thus made is properly admitted. *Ibid.*

4. When a defendant, who is the obligee in a bond for titles, and is sued in ejectment by the obligor to recover the land on the defendant's failure to pay the entire purchase-money, files an equitable defense, it is error in the Court to dismiss the case because the plaintiff declines to amend his declaration so as to change his action to assumpsit for the recovery of the purchase-money. *Ibid.*

5. Where A, by his will, devised a tract of land to be sold and the proceeds to be divided between B and C, and appointed B his executor, and B proved the will and took out letters, and went into possession of the premises, A having lived thereon at his death, and B afterwards died:

Held, that in an action of ejectment, brought by the administrator *de bonis non* of A against the widow of B and his administrator, the defendants were estopped from setting up title in B, acquired previously to the death of A. Whether the title is good or bad, the defendants cannot set up a title adverse to that under which B

got possession of the premises. *Benjamin et al. vs. Gill*..... 110

6. A trustee or executor cannot, after he has accepted the trust, set up a title adverse to the trust. *Ibid.*

7. Where land is devised to B and C, and the testator, after making his will, conveys the land by deed to B, whom he appoints his executor, and who qualifies as such after the death of testator. *Query*, whether B it estopped from denying that the land passed by the will? *Ibid.*

EQUITY.

1. Misrepresentation of a material fact, made by one of the parties to a contract, though made by mistake and innocently, if acted on by the opposite party, constitutes legal fraud. *Elder vs. Allison*..... 13

2. Where the obligor, in a bond for titles, sues the obligee in ejectment, on failure of the latter to pay the entire purchase-money, and the obligee files a bill alleging a misrepresentation of a material fact by the obligor, at the time of the purchase, as to the area of the land; that he acted on such misrepresentation; that the obligor can make no title to that part of the land so misrepresented as belonging to the tract sold; and offering to pay into Court whatever may be equitably due, and seeking to enjoin the action of ejectment, which allegations are not denied; the injunction should be granted, and the question as to whether the obligee acted on the misrepresentation of the obligor or not, should be left to a jury. *Ibid.*

3. A defendant in ejectment may set up an equitable defense in his plea, but is not obliged to do so; he may file his bill if he prefer it. *Ibid.*

4. To entitle a complainant to a decree for a specific performance of a parol contract for the sale of land, the contract must first be established with reasonable certainty, and the consideration claimed to have been paid or rendered therefor must be clearly and satisfactorily proved to have been paid or rendered, in pursuance of that contract; otherwise, a specific performance of the alleged contract should be refused. *Shropshire et al. vs. Brown*..... 175

5. The Statute of Frauds requires that any contract for the sale of lands or any interest in or concerning them, must be in writing, signed by the party to be charged therewith, or by some person by him lawfully authorized; but the Statute of Frauds does not extend to cases where the contract has been *fully executed*, or where there has been performance on one side, accepted by the other, in accordance with the contract. *Rawlins vs. Shropshire*..... 182

6. Full payment alone accepted by the vendor, if clearly proved with reference to the parol contract, will be sufficient part performance to justify a Court of equity to decree a specific performance of such parol contract for the sale of land. *Ibid.*

7. To allow the vendor of the land or his legal representative to retain the land and the purchase-money paid therefor, as against the vendee and those claiming under him, would be a fraud upon the latter which a Court of equity will not permit or sanction. *Ibid.*

8. An assignment by one, insolvent at the time, to one creditor, to the exclusion of others, and providing for a return of the surplus, after paying the debt to the assignor, is not, since the Act of 1866, in this State, fraudulent upon its face as to other creditors, and a bill alleging no other facts, but merely charging that the said assignment was intended to defraud and delay another creditor, but stating no other facts indicating fraud, is demurrable for want of equity. *Rowland vs. Coleman et al*..... 204

9. When an estate is largely insolvent, and there are many creditors of equal degree, fifteen of whom have sued at law, and there are others who have not sued, the administrator may file a bill in equity to marshal the assets, and to compel the creditors to come and prove their debts, and not harrass the administrator with numerous suits. But he cannot join in such bill creditors of higher dignity, whose claims are undisputed, especially if they be judgments, at the death of the testator. *Green vs. Allen et al*..... 205

10. Equity will reform a marriage contract, after the death of the husband, at the instance of his child by a former marriage, if it is made plainly to appear that

at the time of the second marriage, it was agreed between the parties that the property of each should be settled on its owner for life, with remainder to the children of such owner by a former marriage, but the draftsman of the contract omitted to insert the provision as to the husband's property, and both parties signed under the impression that it was inserted. *Burge et al. vs. Burge* 301

11. Ignorance of the omission on the part of the husband, with knowledge of it on the part of the wife, and concealment of it by her from him at the time of signing the contract, would be a fraud upon him, and on this ground equity would reform the contract. *Ibid.*

12. If the husband is informed, after the marriage, of the omission, and says he will rectify it by his will, but fails to do so, though he lives for twenty months thereafter, he cannot be said to have acquiesced in the instrument as written, so as to prevent equity from reforming it, especially where there is no evidence of acquiescence on the part of the remainderman, who was a minor at the death of the husband. *Ibid.*

13. Though a defendant in an action at law may, in Georgia, set up an equitable defense by his plea, yet he is not obliged to do so, and if he omit it where such defense constitutes an independent claim against the plaintiff, he is not thereby estopped after judgment against him in the common law action, from filing his bill to enjoin the judgment and to set up his equitable defense against it. *Fannin vs. Thomasson* 533

14. The second section of the Relief Act of 1868 allows the defendant to avail himself of such equitable defense by motion, in place of filing a bill in the class of cases therein mentioned. *Ibid.*

15. Where an answer in equity is waived, the answer is not evidence against the allegations in the bill. Any admissions, however, made in the answer, stand upon the same footing with any other admissions of defendant and may be relied on by complainant as evidence of the facts admitted—the whole answer being before the jury, and the admissions being subject to

such qualifications as may be gathered from other facts of the answer; but the jury are not bound to believe the qualifications. *Sims vs. Ferrill*..... 585

16. Trust and confidence reposed in a brother-in-law by his widowed sister-in-law requires the utmost good faith and fair dealing in any contract of sale between them. A misrepresentation of the law by the brother-in-law to the sister-in-law, whereby she is led to believe her title to property held by her is invalid, and on this account she sells it to him, which sale is much to his advantage, vitiates the sale at her election, even though such misrepresentation was made in good faith. *Ibid.*

17. Where, under the foregoing relations of trust and confidence, a sale is effected between the parties during the war, for Confederate money, which is to be paid in cash, and the brother-in-law applies a portion of the money to the extinguishment of a lien, supposed to rest upon the property without the widow's consent, but in accordance with what he alleges, and she denies to have been the bargain, pays the widow a portion, and retains a large portion in his own hands, without her consent, and for which he does not clearly account, she is entitled to a decree setting aside the sale upon her accounting for the Confederate money actually received by her at a fair valuation. *Ibid.*

18. Where a bill was seeking to pursue a trust fund which had been paid by K. to M., the attorney, by him to F., the trustee for complainant, and by him had been turned over to G., his successor, said fund being in Confederate money; and the questions in controversy were whether all or either of the parties who had received the Confederate money, had done so in bad faith, so as to make them all or any of them liable to complainant, it was error to dismiss the defendants, F. and H. the administrator of G., as not being proper parties. (R.) *King vs. King et al*..... 644

ESTOPPEL.

1. Where A, by his will, devised a tract of land to be sold and the proceeds to be divided between B and C, and appointed B his executor, and B proved the will

and took out letters, and went into possession of the premises, A having lived thereon at his death, and B afterwards died:

Held, That, in an action of ejectment, brought by the administrator *de bonis non* of A against the widow of B and his administrator, the defendants were estopped from setting up title in B, acquired previously to the death of A. Whether the title is good or bad, the defendants cannot set up a title adverse to that under which B got possession of the premises. *Perryman et al. vs. Gill*..... 110

2. A trustee or executor cannot, after he has accepted the trust, set up a title adverse to the trust. *Ibid.*

3. Where land is devised to B and C, and the testator, after making his will, conveys the land by deed to B, whom he appoints his executor, and who qualifies as such after the testator: *Quære*, whether B. is estopped from denying that the land passed by the will? *Ibid.*

4. In an action for false representation, by which the plaintiff was damaged, if the representation be by deed, so that the defendant is estopped from denying the fact, he may yet show that the plaintiff knew the truth, for the purpose of fixing a time when the right of action accrued and the Statute of Limitations commenced running against the plaintiff's claim, it appearing that the plaintiff was seeking to avoid the statutory bar by showing that he had not discovered the fraud until long after the same was committed. *Cade vs. Burton et al*..... 456

5. When a married woman, having a separate estate, executed a mortgage thereon to secure the payment of the sum of $8,000 loaned to her, and made an affidavit on the back of the mortgage that the money was to be used for the payment of the purchase-money due for the property, and it appearing that the money was loaned on the faith of that sworn statement:

Held, That she was estopped from controverting the facts stated in her affidavit on application for a homestead exemption under the Homestead Act of 1868, as against the mortgagee. *Lathrop vs. The Soldiers L. & B. Association*..... 483

6. Whether a judgment of foreclosure of a mortgage bars a claimant under purchase from the mortgagor subsequent to the mortgage, from setting up defenses which might have been made by the mortgagor, discussed. (R.) *Guerin vs. Danforth*..... 49

7. Where several owners of land lying on the line of a projected railroad make a written agreement, that if the road is located as projected, they will grant to the company the right of way over their land, and the road is accordingly so located and built, the owners of the land are estopped from claiming damages for the running of the road through their land, and on trial, under charter for ascertaining the value of the fee simple right to the land used, the value is to be counted on, so far as it had value over and above the right of way. *Macon & A. R. R. Co. vs. Bowen*..... 531

8. The grant of the right of way over land in consideration of the location of a railroad, as projected, is not revocable after acted on. (R.) *Ibid.*

9. Though a defendant in an action at law may, in Georgia, set up an equitable defense by his plea, yet, he is not obliged to do so; and if he omit it where such defense constitutes an independent claim against the plaintiff, he is not thereby estopped after judgment against him, in the common law action, from filing his bill to enjoin the judgment and to set up his equitable defense against it. *Fannin vs. Thompson*..... 533

See *Landlord and Tenant*, 1, 2.

EVIDENCE.

1. Although a corporation, as such, can do no corporate act out of the limits of the State granting its charter, yet its agents and officers may bind it by contracts and engagements made in other States, and the minutes of its board of directors may be used as evidence of the acts of the board, even though the meetings of the board appear to have been held out of the State chartering the corporation. *The Wood H. H. Mining Co. vs. King*..... 34

2. It is a necessary incident of a mining corporation that it shall have power to contract and to bind itself to those dealing with it in matters within the intent of

the charter, even though the charter contains no express grant or power to contract or make debts. *Ibid.*

3. The answer of the defendant to the complainant's bill to enforce his vendor's lien, alleging a breach of warranty and the insolvency of the complainant, there being no claim of solvency in the bill, is not responsive to the bill; and if there be no other evidence, the jury is not bound to notice the statements in the answer as to the solvency of the complainant. *Smith vs. Hudson* 208

4. False representations made by defendant in *fi. fa.* to claimant, in reference to his pecuniary condition, to induce the claimant to sell him the goods in controversy on credit, are admissible on the trial of the claim case, to show the contract of sale void, on account of misrepresentation of a material fact. *Chisolm vs. Chittenden & Co* 213

5. When the question was whether goods belonged to defendant in *fi. fa.*, what he said when he bought them is admissible to show fraud practiced by him, though plaintiff in *fi. fa.* was not present. (R.) *Ibid.*

6. That a witness did not hear all of a conversation of defendant about which he is called to testify, is no ground of objection to his stating so much of it as he did hear. *Westmoreland vs. The State* 225

7. The defendant cannot give in evidence his own sayings as to when a certain injury was inflicted upon him, and who inflicted it, made to his physician two or three days after the perpetration of the act for which he is indicted. *Ibid.*

8. The testimony of a witness, since deceased, given before the magistrates on a commitment trial for an assault with intent to murder, may be used against the defendant in a civil suit for damages by the person injured. *Gavan vs. Ellsworth* 283

9. The objection to the admission of the judgment against the executor, as such, in evidence, was well taken, as it was entirely irrelevant to the issue. *Sloan vs. Nance et al* 310

10. In an action for false representation, by which the plaintiff was damaged, if the representation be by

deed, so that the defendant is estopped from denying the fact, he may yet show that the plaintiff knew the truth, for the purpose of fixing a time when the right of action accrued and the Statute of Limitations commenced running against the plaintiff's claim, it appearing that the plaintiff was seeking to avoid the statutory bar by showing that he had not discovered the fraud until long after the same was committed. *Cade vs. Burton et al*..... 456

11. When, in a contest between judgment creditors, in the distribution of money raised from the sale of defendant's property, it was offered to prove the sayings of defendant, that the judgment of one of the creditors was paid, and it was alleged that there was proof of a conspiracy between the defendant and that creditor to keep open the execution with the intent to defraud other creditors:

Held, That the evidence was properly rejected, there being no proof of a conspiracy at the time the sayings sought to be proven were made. *Foster vs. Thrasher.* 517

12. Where, on a bill filed by legatees under a will against the executor for an account, the only issue admitted to a jury was whether a receipt held by the executor, signed by the testator, was a good discharge of certain notes held by the testator against the executor, and the bill charged that the receipt was obtained by undue influence, and whilst the testator was not of sound mind, and the answer set forth the receipt in full and relied on it, and the original was, under order of the Judge, deposited for inspection, and it plainly appeared on its face that certain words and figures therein had been altered, but there was nothing to show that the alterations were made subsequent to its signing:

Held, That, as the plaintiff allowed the receipt to go in evidence without any objection to it on the ground of its alteration, and there was nothing in the evidence to show that the alterations were not made previously to the signing of the same by the testator, the presumption of law is that the alterations were made previously, and it was not competent for the jury to find against the validity of the receipt on the ground of the apparent alterations. *Thrasher vs. Anderson et al*..... 538

13. When a bill charges that complainant was induced to sell land to defendant by representations of the latter, that the title was defective, and the defendant is also charged as standing in a fiduciary character to complainant, and that complainant would not have sold but for such representations, which were not true, it is not error to allow complainant to prove her conversations before the representations made to her with a third person, in which she said she had no desire to sell, for the purpose of showing the state of her mind as to her willingness or unwillingness to sell before the representations were made, especially when defendant alleges she was always willing to sell, independently of any representations made by him to her. *Sims ve. Ferrill*..... 585

14. Where the fact that complainant went to Rome to receive the Confederate money was proven, her reasons stated at the time of her act should have been received as part of the *res gestæ*. (R.) *King vs. King*..... 644

FACTORS.

1. The statutory factor's lien covers only the crop. (R.) *Speer & Hooks vs. Hart*..... 113

2. Where a factor makes an affidavit that a planter is indebted to him for money loaned to purchase supplies to make a crop, to secure the payment of which, and costs, and counsel fees, such planter gave a draft for the money, containing a lien on his crop and stock of all kinds, in which lien it did not appear that the money was to be used to purchase said supplies, and which affidavit was made to foreclose said lien, under section 1977, of the Revised Code, before a Judge of the Superior Court of a different circuit from that in which the property was situated:

Held, That the lien is not such an one as can be foreclosed in the manner pointed out by section 1977 of the Code. *Ibid.*

3. Where a planter, in March, 1869, gave his factor a note for $2,000, secured by mortgage of realty as collateral security for all advances made by the factor, up to November 1st, 1869, at which date the planter owed the factor about $1,300, and after that time

the planter sent forward cotton, which the factor sold for more than $1,300, but the planter drew upon him by draft in favor of different persons as he forwarded his cotton, and the factor took up notes of the planter to an amount large enough to absorb the whole proceeds of the cotton, except about $650, which was credited on the amount due the factor on November 1st, the note and mortgage are still collateral security for the balance due the factor. The drafts by the planter and the notes taken up are an appropriation of the proceeds of the cotton to debts other than that due the factor on November 1st, 1869. *Hilton vs. F. W. Sims & Company*..... 5(

FORMER RECOVERY.

See *Res adjudicata*, 4.

GARNISHMENT.

1. When a garnishee does not admit in his answer that he is *indebted* to the defendant, or that he had any effects in his hands *belonging to him*, but states the fact that a sum of money was placed in his hands to indemnify him as security on a bail bond for the defendant, without stating who placed the money in his hands, and that he had been sued by a third party who claimed the money:

Held, That it was not error in the Court to refuse to allow the plaintiff to enter up a judgment against the garnishee upon the statement of facts disclosed in his answer. If the plaintiff had thought proper to have done so, he could have traversed the answer of the garnishee, and have shown that the money in his hands was the property of the defendant. *Thompson vs. Fischesser et al*..... 36(

2. The Central Railroad and Banking Company cannot be served with a summons of garnishment by serving *any one* of its agents. The service must be on the president of the company. *Clark vs. Chapman et al*..... 48(

3. The Central Railroad and Banking Company has, by law, its principal office of business at Savannah, and it cannot be required to answer a summons of garnishment in any other county than the county

of Chatham, unless it appear on record that the debt that it is charged to owe is within some of the statutes authorizing corporations to be sued out of the county where the principal business office is situated. *Ibid.*

4. The garnishee is bound to answer what he is indebted, etc., before the calling of the cause against him at the second term, unless by leave of the Court, he is granted further time, and if he neglects so to answer until the plaintiff has obtained his judgment against the principal debtor, and the juries have been discharged for the term, it is error in the Court to permit him then to answer, unless for good cause shown. *Ibid.*

5. In this case, as it appears from the record, that the garnishee was not bound to answer in Richmond county at all, and was not properly served with the summons, we affirm the judgment of the Court, discharging the garnishee. *Ibid.*

GUARDIAN AND WARD.

1. Any party at interest, who is dissatisfied with a judgment of the Ordinary, may appeal to the Superior Court, on payment of costs, and giving security for future costs, except in a case involving the removal of an administrator, etc., and this right of appeal, on the terms indicated, extends also to cases where the Ordinary has given judgment for money against an administrator, or guardian under a citation for a settlement, as provided by section 1830 of the Revised Code. *Hobbs vs. Cody*.. 478

2. The Act of 16th March, 1869, requiring all causes of action accruing before 1st of June, 1865, to be sued by the 1st of January, 1870, does not apply to a suit by a ward against his guardian to compel an account, if the ward does not come of age until after June, 1865, since the cause of action—the refusal of the guardian to account—did not accrue until the ward came of age. *Ibid.*

3. The taking of the individual note under seal of a guardian by the husband of the ward, in settlement of the guardian's account, which note is payable to

the husband, as trustee of his wife, and a receipt in full by husband and wife to the guardian, whereby they release him "from any and all liability growing out of, or connected with said guardianship," and the further fact that the marriage settlement, under which the husband is trustee, limits the property settled (of which the note is part) to the wife for life, with remainders over, is a novation of the original debt of the guardian, and destroys its fiduciary character. And if parol evidence be introduced to show that the parties really intended to discharge the guardian, as such, and the Judge, by his charge, leaves the question of discharge to the jury and they find in the affirmative, this Court will not disturb the verdict. *Coleman vs. Davis*..... 498

4. If, in a suit against a guardian, by his ward and her husband, for wasting the ward's estate, long and complicated accounts, running through a series of years, are submitted to the jury without having been referred to an auditor, and the Judge charges the jury correctly as to the liability of the guardian for mixing his ward's funds with his own, but the record does not show that the Court was requested to instruct them, or that he did instruct them as to the rules by which they were to be guided in making their calculations as to the proper credits to be allowed the guardian in his disbursements, the items of which are not specifically surcharged and falsified, and they return a verdict in favor of the complainants for a round sum, not indicating the process by which they arrived at the result, this Court will not undertake to say, at the instance of the complainants, that the verdict is contrary to evidence, and the principles of justice and equity, or to the charge of the Court. Nor will the Court grant a new trial on the ground that the verdict is contrary to law, where no such assignment of error appears in the record. *Napier et al. vs. Jones*.. 520

5. Where such accounts are so submitted to the jury, and the accounts run through the entire period of the war, involving the receipt and payment of large sums of Confederate money by the guardian, the jury will be allowed a liberal discretion in adjusting the equities between the parties, under the Ordinance of 1865, and

this Court will not scan too critically the result at which they arrive, no bad faith appearing on the part of the guardian. *Ibid.*

6. The law allowing compound interest to be charged against trustees after six years, and annually thereafter, in certain specified cases, was suspended during the war by Act of December 6th, 1862, which takes precedence of the Code by Act of December 13th, 1862. *Ibid.*

7. The returns of a guardian, made in good faith, are only *prima facie* evidence against him, and may be explained by parol evidence. In the charge upon this point, the Court erred, but it was in favor of complainants. *Ibid.*

HABEAS CORPUS.

1. A colored child, born before the 9th day of March, 1866, within what was regarded as a state of wedlock between its parents, while slaves, and who is acknowledged by its father, is the legitimate child of both parents. If the parents separated before that date, and the child remained with the mother, she is entitled to the control of it during minority. But if she voluntarily yield the control to the father, and he takes the child away with him, she cannot afterwards resume the control without the assent of the father, no reason being shown why the father should not retain the custody of the child. *Mitchell et al. vs. McElvin*..... 558

2. If, under such circumstances, the mother is induced to sign articles apprenticing the child to a third person, under representations made to her by that person, that if she did not do so, he would send the child off to another State, out of her reach, the articles are void, as against the rights of the father, and any master to whom he may have apprenticed the child; and, on a writ of *habeas corpus* sued out at the instance of the person holding the articles from the mother against the father and the master to whom he had apprenticed the child, the child should have been remanded to the custody of the respondents; especially where the mother testifies that she does not desire to withdraw the child from the custody of the father, and

that she was induced to sign the articles by the representations made to her. *Ibid.*

HOMESTEAD.

1. That a third person, not the defendant, has taken a homestead on land, against which a mortgage *fi. fa.* has issued, will not excuse the sheriff for failing to sell, when such *fi. fa.* is placed in his hands for levy and sale. *Blackman vs. Clements*..... 292

2. Where a will directs realty to be sold, and bequeaths the proceeds to minors, and the executor, who is also testamentary guardian of the minors, has such realty set apart as a homestead, for his wards, he cannot afterwards sell the homestead at private sale, even with the consent of the Ordinary, although the will gives him the power so to sell the land. When the land was set apart as a homestead, the title was vested in the minors. *Sloan vs. Nance et al*..... 310

3. The Superior Court has jurisdiction to correct errors by a writ of *certiorari* to the judgment of the Ordinary, allowing a homestead under the provisions of the seventh section of the Homestead Act of 1868. *Lathrop et. al. vs. The Soldiers L. & B. Association.* 483

4. When a married woman, having a separate estate, executed a mortgage thereon to secure the payment of the sum of $8,000 loaned to her, and made an affidavit on the back of the mortgage that the money was to be used for the payment of the purchase-money due for the property; and it appearing that the money was loaned on the faith of that sworn statement:

Held, That she was estopped from controverting the facts stated in her affidavit on an application for homestead exemption under the Homestead Act of 1868, as against the mortgagee. *Ibid.*

5. The wife having no children of her own, is not the "head of a family" of the children of her husband by a former marriage. (R.) *Ibid.*

6. When Young applied for a homestead, as the head of a family, and, on an appeal from the Court of Ordinary to the Superior Court, a verdict was found against him, on the ground that he was not the head of a family. Afterwards, he made a second application

for homestead, on the same land, as the head of a family, which was allowed by the Ordinary, and an appeal was taken to the Superior Court. When the case was called in the Superior Court, a motion was made to dismiss the application, on the ground that the applicant's right to a homestead had been adjudicated. The applicant made a motion to amend his petition for homestead by inserting a new right of homestead which had accrued since the former verdict and judgment, but which was not included in his petition to the Ordinary. The Court refused to allow the amendment, and dismissed the application:

Held, That the Court erred in refusing to allow the amendment and dismissing the petitioner's application without a hearing of the same, under the evidence in the case. *Young vs. Brown*..... 552

7. Where one had procured a homestead to be set off to him under the Constitution of 1868, in a certain tract of land, and had filed a bill against a creditor, who was about to sell the same, under a judgment, for the purchase-money, and the Court refused to charge the jury "that if they should find that the debt was, in fact, for the purchase-money, and the homestead, therefore, subject, they might still enjoin the execution as to fifty acres of the land, on the ground that this was exempt from levy, under section 2013 of the Code:"

Held, That there was no error in this refusal to charge; such a decree would have been foreign to the objects of the bill, and an improper finding, under the pleadings in this case. *Hollingsworth vs. Smith et al*..... 583

8. The approval of the Ordinary to the alienation of homestead property is required for the protection of the wife and children; and this is not only a proceeding before the Ordinary, but is an important function which he is required to perform in the exercise of his judgment as a judicial officer, and he ought to be clearly satisfied in all cases that the wife's consent is freely and voluntarily given, and that the sale will be for the benefit of the wife and children. (R.) *Burnside vs. Terry et al*..... 622

9. A deed to property covered by a homestead, approved by an Ordinary who was related to the grantee within

the fourth degree of consanguinity, is void. (R.) *Ibid.*

ILLEGAL CONSIDERATION.

See *Contracts*, 1, 2.
" *Set-off*, 3.

ILLEGALITY.

1. Where a judgment has been obtained since the adoption of the Constitution of 1868, it cannot be attacked by affidavit of illegality to the execution issued thereon, on the ground that the consideration of the contract on which the judgment is founded was a slave. Such defense should have been made to the action. *Lewis vs. Armstrong et al*..... 131

2. When judgment was obtained at common law against the makers and indorser of a note, and an appeal entered, which was afterwards dismissed, and subsequently, the indorser is again sued on the note, and permits a judgment to be taken against him by default, he cannot, by affidavit of illegality, attack such second judgment on the ground that a prior judgment, unreversed, existed against him for the same debt. He should have made this defense to the second action. *Ibid.*

3. When an affidavit of illegality, with the usual bond, is delivered to the sheriff, it is returnable to the next regular term of the Court from which the execution issued, and not to an adjourned session of the same term. *Beall vs. Bailey*..... 300

4. If the sheriff makes his return to such adjourned session, and the Clerk enter the case on the docket, it is error in the Court to call the case up, and dismiss it at that term. *Ibid.*

5 When a judgment was rendered against the defendants, as administrators, and the Clerk issued an execution thereon, in favor of the plaintiff, commanding the sheriff to make the money due on the judgment of the goods and chattels, lands and tenements of the intestate, in the hands of the administrators, and in default thereof, of the goods and chattels, lands and

tenements of the administrators, in their individual capacity:
Held, That the execution so issued was illegal, on the statement of facts disclosed by the record:
Held, That the affidavit of illegality was amendable on the motion made therefor by the defendant. *Horn et al. vs. Bird*..... 610

INDICTMENT. See *Criminal Law*, 2, 9, 36, 37.

INFANTS.

Minors, who have a guardian, may sue by next friend, when their interest is adverse to that of the guardian, under Revised Code, section 1812. *Sloan vs. Nance et al*..... 310

INJUNCTION.

1. Equity will not interfere to restrain a trespass, unless it affirmatively appears that the damage will be irreparable, or, from the insolvency of the trespasser, or other cause, the remedy at law is incomplete. *Seymour vs. Morgan*..... 201

2. When A, a school teacher, was induced by B, another school teacher, to purchase of B the lease of an academy, under inducements held out by B that, if he could sell, he would quit teaching in the locality, and, on these inducements, the purchase was made:
Held, That equity will enjoin B from teaching a school in the locality, during the lease. *Spier vs. Lambdin*..... 319

3. On a proper case made by bill, in the name of the citizens of the county—tax-payers—it is the duty of the Judge of the Superior Court, as Chancellor, to restrain, until the hearing on the merits, an Ordinary from ordering such bonds to be paid by the treasurer of the county: *Provided*, the injunction be so framed as not to interfere with the rights of bondholders who are not parties to the bill, to the use of every remedy allowed by law, through the Courts of law and equity, to test and enforce any claims they may set up against the county in the premises. *Dent et al. vs. Cook et al*..... 323

4. Where one had procured a homestead to be set off to him under the Constitution of 1868, in a certain tract of land, and had filed a bill against a creditor, who was about to sell the same, under a judgment, for the purchase-money, and the Court refused to charge the jury "that if they should find that the debt was, in fact, for the purchase-money, and the homestead, therefore, subject, they might still enjoin the execution as to fifty acres of the land, on the ground that this was exempt from levy, under section 2013 of the Code:"

Held, That there was no error in this refusal to charge; such a decree would have been foreign to the objects of the bill, and an improper finding, under the pleadings in this case. *Hollingsworth vs. Smith et al*..... 583

5. The Mayor and Aldermen of the city of Savannah have no such property in the streets and squares of the city, under the Act of 1760, or any Act amendatory thereof, as entitles them to pecuniary compensation for the additional servitude, so placed upon the streets and squares by the Legislature. Nor have they the right to an injunction restraining the construction of the railway for the benefit of the residents along such streets and squares. If such residents are damaged by the construction of the railway, they will be heard by the Courts upon a proper case made. *The Savannah and Thunderbolt Railroad Company vs. The Mayor and A. of Savannah*..... 602

6. When the Brunswick and Albany Railroad had, at great expense, graded a street of the city of Albany of sufficient width for laying therein two railroad tracks, on an assurance from the City Surveyor that, should the Southwestern Railroad desire also to use the street, the city would require the Southwestern Railroad to pay to the Brunswick and Albany Railroad half the expense of the said grading, etc., and the City Council, afterwards, in view and furtherance of the said assurance, granted to the Southwestern Railroad the right to use said street, provided it paid to the Brunswick and Albany Railroad the half of said expense, and the Brunswick and Albany Railroad laid their track so as to conform to this grant of the city to the Southwestern Railroad:

Held, That equity will restrain the city of Albany from revoking the conditions of their grant to the Southwestern Railroad and directing the money to be paid to the city, and will also restrain the Southwestern Railroad from paying the money to the city. *The Southwestern Railroad Company et al. vs. Screven*.....613

7. The Court, not being clear from the record and the bill of exceptions, that the dissolution of the injunction complained of was not a final disposition of the cause, so far as the injunction is concerned, will direct the bill of exceptions to be signed, though presented more than fifteen days after the judgment complained of. (R.) *Dougherty vs. Harvey*..... 618

8. Where property has been mortgaged, which is subject to the support of the mother of the mortgagors during her natural life, and proceedings are instituted to foreclose by the mortgagees, there is no good legal or equitable ground why the mortgages should not be foreclosed, as between the mortgagors and mortgagees, as such proceedings will not in any manner affect the right of the mother to her support out of the mortgaged property, provided the same is not sold under the judgment of foreclosure. (R.) *Colquitt & Baggs vs. Tarver*..... 631

INSANITY. See *Criminal Law*, 16, 20, 29.

INSURANCE.

1. An insurance company which reserves to itself the right to cancel its policies upon return of the unearned premium, must pay or tender such premium to the assured before it can relieve itself of liability on the policy. Notice of its intention to cancel, with mere announcement of its readiness to pay, is insufficient. *Hollingsworth & Moraque vs. The Germania and other Insurance Companies*..... 294

2. Surrender of the policy for cancellation prior to the loss, and subsequent payment of the unearned premium to the assured, and acceptance by him, after destruction of the property insured, both parties being ignorant of the loss, will not release the company from liability. *Ibid.*

INTEREST.

The law allowing compound interest to be charged against trustees after six years, and annually thereafter, in certain specified cases, was suspended during the war by Act of December 6th, 1862, which takes precedence of the Code by Act of December 13th, 1862. *Napier et al. vs. Jones*..... 520

INTERROGATORIES.

1. Where interrogatories are taken out by the defendant and crossed by the plaintiff, and both the direct and cross-interrogatories are answered and the defendant introduces and reads to the jury the answers to the direct interrogatories, failing to read the answers to the cross-interrogatories, and the plaintiff reads the answers to the cross-interrogatories, he does not thereby make the witness his witness, so that he cannot impeach him. The answers, to both the direct and cross-questions, are the evidence of the party who offers to the jury the return of the commissioners. *McArdle vs. Bullock & Radcliff*..... 89

2. To read the direct answers to interrogatories and leave the other side to read the answers to cross-interrogatories, is not a correct practice. (R.) *Ibid.*

3. The answer of a witness being full to the material import of an interrogatory is sufficient. (R.) *Deupre et al. vs. Deupre*..... 415

4. It is in the power of parties under the direction of the Court to present the original paper propounded as a will to witnesses residing out of the county of trial, by interrogatories. (R.) *Ibid.*

JUDGE.

1. Where one of the executors of a will to which a caveat has been filed married the sister of the wife of one of the Judges of the Supreme Court, said Judge is not disqualified from presiding by reason of relationship by affinity to said executor, upon the trial of said cause before the Supreme Court. (R.) *Deupree, et al., vs. Deupree et al.*..... 415

2. A deed to property covered by a homestead, approved by an Ordinary who was related to the grantee with-

in the fourth degree of consanguinity, is void. *Burnside vs. Terry et al*..... 621

JUDGMENTS.

1. The judgment on a mechanic's lien, under Act of December 22d, 1834, made general by Act of December 28th, 1837, is not a judgment *in rem*, and hence does not conclude those claiming under a title adverse to the title of him who created the lien. *Stroupper vs. McCauley*..... 74

2. In an issue formed on a motion to distribute money between judgments, one plaintiff in *fi. fa.* cannot attack the judgment of another plaintiff in *fi. fa.* on the ground of irregularities previous to the judgment; the defects, to be subject to his objection, must be such as are not amendable. *Standford & Golden vs. Bradford*..... 97

3. In a joint suit against several, if one be not served, the plaintiff may dismiss as to the one not served; and if he go on to the jury and get a verdict, the verdict is good against those served, though there be a failure to dismiss against the defendant not served. The defect is a mere irregularity, and does not make the judgment void. *Ibid.*

4. Where A sues B in a Notary's Court, on an open account, on which he obtains judgment, and from which defendant appeals, and, pending the appeal, A brings another suit against B in the Superior Court, on another open account, which was due at the commencement of the first suit, both accounts being admitted correct, to which second suit B files no plea in abatement at the first term, but at the second term pleads the judgment obtained in the Notary's Court, in *bar* of the second suit, and, while both cases are pending in the Superior Court, "it is agreed that the jury shall find such verdict in said cases as the Court, under the agreed state of facts, may direct, and it is further agreed that the Judge shall consider both cases together:"

Held, That, under the foregoing facts, there was no such judgment existing as could be pleaded in bar of the suit brought in the Superior Court, and that the Court should have instructed the jury to find a verdict for

the plaintiff for the amount of both accounts. *Tommey & Stewart vs. Finney* 151

5. The application of a widow to the Ordinary for her twelve months' support out of the estate of her deceased husband, should be made by petition, in writing, and notice given to the representative of the estate, if there be one, and the order of the Ordinary should always recite the names of the persons notified. *Fischesser vs. Thompson* 459

6. When the judgment of the Ordinary, allowing to a widow her twelve months' support was presented in the Superior Court, claiming money as a debt of the highest dignity against the claim of a judgment creditor of the deceased, it was competent for such judgment creditor to attack the judgment of the Ordinary, and, inasmuch as it was not recited in the order and judgment of the Ordinary that the representatives of the estate had been notified, and the provisions of the law had been complied with, the judgment of the Ordinary, allowing the widow her twelve months' support, was void, as against the judgment creditor of her deceased husband, who had no notice of her application through the legal representatives of his estate or otherwise. McCAY, Judge, dissenting. *Ibid.*

7. A sale of land of a testator or intestate by the executor or administrator, in the manner prescribed by law, where the estate is insolvent, divests the liens of judgments obtained in the lifetime of the testator or intestate, and the creditor must look to the proceeds in the hands of the representative of the estate. *Sims vs. Ferrill* 585

JUDICIAL INTERFERENCE WITH TAXES.

See *Taxes*, 1.

JURISDICTION OF DISTRICT COURT.

The District Court was not, by the Act of October 28, 1870, clothed with jurisdiction to try and give judgment upon debts and contracts not exceeding $100. *Forbes vs. Owens* 132

JURISDICTION OF SUPREME COURT.

1. This Court can review a decision as to the consolidation of cases, though the cases be pending below. (R.) *Lewis vs. Daniel* 124

2. On a writ of error, to the judgment of the Judge of the Superior Court under the Act of October 29th, 1870, this Court cannot review a decision overruling a demurrer to a bill. *Redwine vs. Glover* 134

JURY.

See *Criminal Law*, 1, 13, 24, 25, 26, 30, 31, 32.

LANDLORD AND TENANT.

1. A purchaser of land cannot plead an outstanding title, adverse to that of his vendor, so long as his possession is undisturbed, unless he set up some distinct equity, showing that his remedy on the warranty will be inefficient. *Smith vs. Hudson* 208

2. One renting real estate from another cannot deny the right of the other to rent, so long as he is not disturbed in the possession; and this is true, even if a mere renter let to a third person, the dissent of the landlord not appearing affirmatively. *Burnett & Brother vs. Rich & Company* 211

3. When in a proceeding under sections 4005, 4013 of the Code, against one as a tenant holding over, the defendant denies the tenancy, and sets up that he entered as the owner, and not as tenant, and an issue is formed and on trial, and the assumed landlord dies, and his administrator is made a party, the defendant cannot be sworn as a witness in his own behalf, unless for the special purpose of proving some fact transpiring since the death of the alleged landlord. *Veal vs. Veal* 511

LEASE.

See *Administrators and Executors*, 6.

LICENSE.

See *Statute of Frauds*, 3, 4.

LIENS.

1. The statutory factor's lien covers only the crop. (R.) *Speer & Hooks vs. Hart* 113

2. Where a factor makes an affidavit that a planter is indebted to him for money loaned to purchase supplies to make a crop, to secure the payment of which, and costs, and counsel fees, such planter gave a draft for the money, containing a lien on his crop and stock of all kinds, in which lien it did not appear that the money was to be used to purchase said supplies, and which affidavit was made to foreclose said lien, under section 1977 of the Revised Code, before a Judge of the Superior Court of a different circuit from that in which the property was situated:

Held, That the lien is not such an one as can be foreclosed in the manner pointed out by section 1977 of the Code. *Ibid.*

3. If it was, the affidavit was not made before an officer authorized to foreclose the lien under that section. (*Query?*) *Ibid.*

4. Where the owner of a steam saw-mill seeks to enforce his lien for lumber, furnished under the Act of 1868 and the Amendatory Act of 1870, he should state, in his affidavit, that his steam saw-mill is located in the State of Georgia. *Porter vs. Lively & McElroy* 159

5. When the lumber has been furnished to a party in possession of the premises, for the erection of buildings and permanent fixtures thereon, who afterwards assigns and transfers the premises, the demand for payment of the lumber should be made on both the party to whom it was furnished and the party in possession of the premises on which the buildings and other fixtures have been erected with the plaintiff's lumber. *Ibid.*

6. Where A, at the request of B, paid to C the purchase-money of certain land, previously sold by C to B, with the understanding that A should have a lien upon the land for the money, as C had, and C, therefore, made to B a deed, and B gave to C a written promise to pay him the amount "for the south half of land, lot number one hundred and thirty-two, containing one hundred and one and a quarter acres, more or less, lying and being in the 14th district of Fulton county:"

Held, That A had, before the adoption of the Code, a lien on the land, in equity, for the purchase-money,

and a bill filed to enforce the same, was not demurrable. *Mitchell vs. Butts et ux*..... 162

7. The lien of an attorney-at-law attaches, for his fees, upon all property recovered by his services, and is superior to all other liens thereon. *Morrison, Heard & Co. vs. Ponder et al*..... 167

8. In this State a creditor cannot get a preferred lien on the assets of an estate, as against other creditors of equal degree, by getting the first judgment against the administrator. *Green vs. Allen et al*..... 205

9. Where an attempt is made to foreclose a lien upon a steam saw-mill, under the Act of October 6th, 1868, it must affirmatively appear in the affidavit that the prosecution of the lien is within one year from the time the debt becomes due; it is not sufficient, where the debt is liquidated by promissory notes, to show that the notes have fallen due within the year. *Phillips vs. Hyde*..... 220

10. Where such a defect appears on the face of the proceedings, and the *fi. fa.* has issued and been levied on the mill, and a claim interposed, the claimant, on the trial of the claim case, may take advantage of such defect, by objection to the affidavit, judgment and *fi. fa.* when offered in evidence. *Ibid.*

11. Where the affidavit fails to state the time the debt fell due, and plaintiff in *fi. fa.* is offered as a witness to prove that the consideration of the notes sued on was work and labor done on the mill, it is competent for claimant to ask him at what time he performed the work, as preliminary to proving that the debt had been due for more than a year. *Ibid.*

12. The Act of 1869, giving to mechanics a lien upon the property of their employers for labor performed and materials furnished, contemplates such mechanics only as perform the labor and furnish the materials to the employer. The Act does not contemplate a manufacturer of materials sold to the employer in the usual course of trade, although that manufacturer may be a mechanic. *Footman vs. Pusey, Jones & Co*..... 561

13. Where property has been mortgaged, which is subject to the support of the mother of the mortgagors during her natural life, and proceedings are instituted

to foreclose by the mortgagees, there is no good legal or equitable ground why the mortgages should not be foreclosed, as between the mortgagors and mortgagees, as such proceedings will not in any manner affect the right of the mother to her support out of the mortgaged property, provided the same is not sold under the judgment of foreclosure. (R.) *Colquitt & Baggs vs. Tarver*..... 631

See *Mortgages; Judgments.*

LIMITATION OF ACTIONS.

1. The Ordinance of 1865, suspending the Statutes of Limitations, was of force, *propria vigore*, irrespective of any confirmation of it by the Convention of 1868. *Goodroe vs. Neal*..... 109

2. In an action for false representation, by which the plaintiff was damaged, if the representation be by deed, so that the defendant is estopped from denying the fact, he may yet show that the plaintiff knew the truth, for the purpose of fixing a time when the right of action accrued, and the Statute of Limitations commenced running against the plaintiff's claim, it appearing that the plaintiff was seeking to avoid the statutory bar by showing that he had not discovered the fraud until long after the same was committed. *Cade vs. Burton et al*..... 456

3. The Act of 16th March, 1869, requiring all causes of action accruing before 1st of June, 1865, to be sued by the 1st of January, 1870, does not apply to a suit by a ward against his guardian to compel an account, if the ward does not come of age until after June, 1865, since the cause of action—the refusal of the guardian to account—did not accrue until the ward came of age. *Hobbs vs. Cody*..... 478

LOST NOTE.

See *Practice*, 10, 11.

MALPRACTICE.

See *Criminal Law*, 36.

MARSHALING ASSETS.

See *Equity*, 8.

MASTER AND SERVANT.

See *Habeas Corpus*, 1, 2.

MEASURE OF DAMAGES.

1. In the assessment of damages to the owners of property, caused by the location and use of a railroad, the actual damage resulting directly from an invasion of their rights of property by the railroad company, is the measure of damages to be rendered. *The Selma, R. & D. R. R. Co. vs. Camp*..... 180

2. The jury are the proper judges of the *quantum* of damages in an action on the case against a railroad company for injuries received by passengers, and this Court will not overrule the Judge below in refusing a new trial for excessive damage, unless the excess be manifest and gross. *Georgia R. R. & Banking Co. vs. McCurdy*..... 288

3. That a third person, not the defendant, has taken a homestead on land, against which a mortgage *fi. fa.* has issued, will not excuse the sheriff for failing to sell, when such *fi. fa.* is placed in his hands for levy and sale; and where he sets up such fact as his only excuse, in answer to a rule to show cause why he should not be compelled to pay the amount of the *fi. fa.* to the plaintiff, a rule absolute will be granted against him for the value of the land, if such value be less than the amount of the *fi. fa.*, otherwise for the amount of the execution. *Blackman vs. Clements.* 292

4. Where several owners of land lying on the line of a projected railroad make a written agreement, that if the road is located as projected, they will grant to the company the right of way over their land, and the road is accordingly so located and built, the owners of the land are estopped from claiming damages, for the running of the road through their land, and on trial, under charter for ascertaining the value of the fee simple right to the land used, that value is to be counted on, so far as it had value over and above the right of way. *The Macon & A. R. R. Co. vs. Bowen.* 531

5. The grant of the right of way over land in consideration of the location of a railroad as projected, is not revocable after acted on. (R.) *Ibid.*

MECHANIC'S LIEN. See *Lien*, 11.

MINORS. See *Amendments*, 2. See *Infants*, 1.

MISREPRESENTATION.

See *Equity*, 1, 2.
" *Sales*, 1, 2, 4.

MISTAKE. See *Attachments*, 1.

MORTGAGES.

1. A mortgage of a stock of goods, under section 1944 of Irwin's Code, cannot, by subsequent purchase and addition of new goods to such stock, be made to cover an amount greater in value than the original stock mortgaged. *Chisholm et al. vs. Chittenden & Co*..... 213

2. If the defendant in *fi. fa.* obtained possession of the goods, under such circumstances, by fraud, and added them to a stock of goods already mortgaged, the lien of the mortgage will not attach to such goods to the exclusion of the claim of the seller, who elects to rescind the contract of sale, no new consideration having passed from the mortgagee to the mortgagor, at the time of such addition to the mortgaged stock. *Ibid.*

3. Whether a judgment of foreclosure of a mortgage bars a claimant under purchase from the mortgagor subsequent to the mortgage from setting up defenses which might have been made by the mortgagor, discussed. (R.) *Guerin vs. Danforth*..... 493

4. Under the Judiciary Act of 1799 and the Act of 1839 amendatory thereto, a mortgage on personal property executed by one non-resident of the State at the time, may, if the property be brought into this State, be foreclosed in the county where the property may be found, and section 3895 of the Code providing for the cases therein mentioned does not repeal the Acts of 1799 and 1839 in this respect. *Griffin & Clay vs. Marshall et al*..... 549

5. Where an instrument recites that B. held judgments against F., amounting to $3,000, and that F. had obtained the benefit of the homestead law upon his realty without objection from B., upon the following agreement: That if F. did not pay the money due upon the judgments on or before January 1st, 1871,

then lot of land number forty, valued at $1,000, is to be the right and property of B., and said judgments are to be considered satisfied; in consideration of which, F. and his wife, L., conveyed the lot of land to B. in fee simple, and declared that the instrument was a conditional deed and not a mortgage, and was to become absolute upon the non-payment of the sum of money due on said judgments at the time specified, and that B. should have the right to enter and take possession at the expiration of the time, said instrument is a deed conveying the land upon a condition subsequent, and not a mortgage. (R.) *Burnside vs. Terry et al*..... 621

6. Where property has been mortgaged, which is subject to the support of the mother of the mortgagors during her natural life, and proceedings are instituted to foreclose by the mortgagees, there is no good legal or equitable ground why the mortgages should not be foreclosed, as between the mortgagors and mortgagees, as such proceedings will not in any manner affect the right of the mother to her support out of the mortgaged property, provided the same is not sold under the judgment of foreclosure. (R.) *Colquitt & Baggs vs. Tarver*..... 631

MUNICIPAL CORPORATIONS.

1. A declaration by one against an incorporated city, alleging that said city had, by an ordinance, prohibited the erection of wooden building in certain parts of said city, and that the City Council had afterwards authorized B to build a wooden building within said limits, and that B's building, taking fire, had caused a building belonging to plaintiff to be burned, is demurrable. *Forsyth vs. The Mayor and C. of Atlanta*..... 152

2. A policeman, sworn in by the Mayor of Atlanta, and performing the duties of policeman, though he may not have been elected as prescribed by the Act of Incorporation, is an officer *de facto*. *Andrews vs. The Mayor and C. of Atlanta*..... 154

3. The State has the same right of eminent domain over the streets and squares of Savannah, dedicated to the use of the inhabitants of the city, by Act of 1760, and those since laid out upon the common, dedicated

by that Act to the same use, as it has over other territory of the State, and may lay an additional servitude upon such streets and squares, by granting to a corporation the right to run a street railway, whose cars are drawn by animal power through them, without the consent of the Mayor and Aldermen of the city. *The Savannah & T. R. R. Co. vs. The Mayor and Aldermen of Savannah*..... 602

4. The Mayor and Aldermen of the city of Savannah have no such property in the streets and squares of the city, under the Act of 1760, or any Act amendatory thereof, as entitles them to pecuniary compensation for the additional servitude, so placed upon the streets and squares by the Legislature. Nor have they the right to an injunction restraining the construction of the railway for the benefit of the residents along such streets and squares. If such residents are damaged by the construction of the railway, they will be heard by the Courts upon a proper case made. *Ibid.*

5. When the Brunswick and Albany Railroad had, at great expense, graded a street of the city of Albany of sufficient width for laying therein two railroad tracks, on an assurance from the City Surveyor that, should the Southwestern Road desire also to use the street, the city would require the Southwestern Railroad to pay to the Brunswick and Albany Railroad half the expense of said grading, etc., and the City Council afterwards, in view and furtherence of the said assurance, granted to the Southwestern Railroad the right to use said street, provided it paid to the Brunswick and Albany Railroad the half of said expense, and the Brunswick and Albany Railroad laid their track so as to conform to this grant of the city to the Southwestern Railroad:

Held, That equity will restrain the city of Albany from revoking the conditions of their grant to the Southwestern Railroad and directing the money to be paid to the city, aad will also restrain the Southwestern Railroad from paying the money to the city. *The Southwestern R. R. Co. vs. Screven et al*..... 613

NEGLIGENCE. See *Municipal Corporations*, 1.

NEW TRIAL.

1. Where a motion to dismiss a pending suit was made, on the ground that no affidavit was filed, as required by the first section of the Act of October 13th, 1870, and the record showed that the note was payable to Richard Sammis, with no words of negotiability, and the suit was in the name of two females, administratrixes and sole heirs-at-law of Richard Sammis, and it was in proof that the plaintiffs were widows and sole heirs of Sammis, and the Court refused to dismiss the suit:

Held, That the proof that the plaintiffs were the owners of the note *in their own right* is not entirely satisfactory; yet, as the Court was satisfied with the proof, this Court will not disturb the judgment, leaving it to the parties more fully to test this question of the true, equitable ownership of the note before the jury on the trial. *Rooney vs. Sammis et al*..... 19

2. When, in a proceeding to foreclose a mortgage, the defendant's plea was defective, and he was allowed until the next day to perfect it, and, on the calling of the case next day further time was asked for to perfect the plea on the ground that one of the counsel, who was also interested as a party, and who alone knew the facts sufficiently to make the amendment, had, that morning, been granted leave of absence by the Judge, for the day, and the Court refused to give the time, and allowed the rule to be made absolute, and motion was made to set aside the judgment:

Held, That the motion to set aside, which was heard and determined by a different Judge, ought not to have been granted without a distinct statement, supported by affidavit, setting forth a substantial defense and showing affirmatively that the defendant had been injured by the absence of his counsel. *Beall vs. The Marietta P. M. Co* 28

3. As there is nothing in the motion to set aside the judgment, or, in fact, before the Judge on hearing of the same, to show affirmatively that, if a new trial was had, the defendant could show any substantial defense, it was error in the Court to grant the motion. *Ibid.*

4. When the Judge who presided at the trial refuses to grant a new trial, on the ground that the verdict is

contrary to the testimony, it must be a very strong case indeed to justify the Court in overruling the judgment. *The Wood H. H. M. Co. vs. King* 34
Loyd vs. The State 57
McGhee et al. vs. Taylor 116
Fry vs. Lofton 171
Gavan vs. Ellsworth 283
Cohen & Hargrove vs. The Rome R. R. Co 293
Nunez & Co. vs. The Southern Express Co 314
Veal vs. Veal 511
King vs. King 644

5. If the verdict is amply sustained by the evidence, and no material error appears in the rulings of the Court below, a new trial will not be granted. (R.) *Holsenbake vs. The State* 43
Burge et al. vs. Burge 301
Foster vs. Thrasher 517
Sims vs. Ferrill 585

6. The Court will not interfere with the province of the jury to pass upon the facts, unless the verdict be so grossly contrary to the testimony as to justify the inference of mistake, fraud or prejudice. *McArdle vs. Bullock & Radcliff* 87

7. When, under the declaration, pleas and evidence in a case, the jury has done substantial justice between the parties, this Court will not reverse the judgment on mere technical grounds, but will give such direction to the cause as will correct the error and yet not open the dispute for further litigation. *Boram vs. Thweatt.* 94

8. In a suit on a *quantum meruit* for professional services, when there is conflicting evidence as to the amount and efficiency of the service, this Court will, only in a very extreme case, reverse the judgment of a Judge refusing a new trial. The jury in such cases are, by law, the proper tribunal to estimate the services, and the Court ought only to interfere in extreme cases, so as that the verdict is illegal. *Weems & Cowles vs. Nussbaum & Dannenburg* 123

9. Where a person is presented, under the city ordinances, for obstructing an officer in the discharge of his duties, and convicted, and the evidence on the part of the prosecution fully sustained the conviction,

this Court will not, as a general rule, interfere. *Andrews vs. The Mayor and C. of Atlanta*..... 154

10. When by the written consent of the parties, the questions of law and fact were submitted to the presiding Judge, in lieu of a jury, as to the fees claimed by counsel in the particular case mentioned in the record, his judgment will not be set aside, unless some rule of law has been violated, or unless his judgment is so strongly and decidedly against the weight of the evidence as would authorize the Court to set aside the verdict of a jury. *Morrison, Heard & Co. vs. Ponder et al*..... 167

11. The verdict was not set aside, though there was an error in the charge of the Court. (R.) *Humphreys vs. The State*..... 190

12. In a suit against a common-carrier for the loss of a trunk, there being evidence going to show that the shipper placed a value upon the trunk, at the time of shipment, much less than the amount of the verdict in favor of the plaintiff, a new trial will not be granted at his instance, especially where, on looking to the whole record, the verdict is not so decidedly against the weight of evidence as to warrant the Court in setting it aside. *Green vs. The Southern Express Co*..... 305

13. Where there is an erroneous charge given to the jury a new trial ought to be granted, unless the evidence is so decidedly in favor of the verdict, that the jury must have found the same verdict, even if the law had been correctly charged. *Deupree et al. vs. Deupree et al*..... 415

14. When, on the trial of a case, substantial justice has been done, under the evidence disclosed in the record, although there may have been some errors in the rulings of the Court, the verdict of the jury ought not to be disturbed. *Guerin vs. Danforth*..... 493
Napier et ux. vs. Jones..... 520

15. If, in a suit against a guardian, by his ward and her husband, for wasting the ward's estate, long and complicated accounts, running through a series of years, are submitted to the jury without having been referred to an auditor, and the Judge charges the jury correctly as to the liability of the guardian for mixing

his ward's funds with his own, but the record does not show that the Court was requested to instruct them, or that he did instruct them, as to the rules by which they were to be guided in making their calculations as to the proper credits to be allowed the guardian in his disbursements, the items of which are not specifically surcharged and falsified, and they return a verdict in favor of complainants for a round sum, not indicating the process by which they arrived at the result, this Court will not undertake to say, at the instance of the complainants, that the verdict is contrary to evidence, and the principles of justice and equity, or to the charge of the Court. Nor will the Court grant a new trial on the ground that the verdict is contrary to law, where no such assignment of error appears in the record. *Napier et al. vs. Jones*... 520

16. Where such accounts are so submitted to the jury, and the accounts run through the entire period of the war, involving the receipt and payment of large sums of Confederate money by the guardian, the jury will be allowed a liberal discretion in adjusting the equities between the parties, under the Ordinance of 1865, and this Court will not scan too critically the result at which they arrive, no bad faith appearing on the part of the guardian. *Ibid.*

17. Where the verdict of the jury is strongly and decidedly against the weight of the evidence, and without sufficient evidence under the law to authorize a conviction for the offense alleged in the indictment, a new trial will be granted. *Rice vs. The State*..... 526

18. Where, upon the calling of a cause, a motion was made by the defendant to continue the same on the ground of the absence from providential cause of one of his counsel, who was also his son, and the defendant made affidavit that the absent counsel was the leading counsel, who had been entrusted with the entire charge of preparing and arranging the evidence, and with whom he had more free and full conferences than with any other counsel; that he could not safely go to trial without his presence; that the application was not made for delay; and the Court refused the continuance, and after a verdict for the plaintiff, it appeared on a motion for a new trial, that the defendant was se-

riously damaged by the absence of said counsel, in this that the counsel was in possession of a paper that would have been material evidence on the trial, by reason of the answers to a certain set of interrogatories opened upon the trial:

Held, That, in furtherance of the principles of justice and equity, a new trial ought to have been granted. *Thrasher vs. Anderson et al*..... 538

NON-RESIDENTS.

See *Relief Act of* 1870, 7, 8.

NOTICE. See *Wills*, 8.

NOVATION.

1. Redwine and his wife obtained a decree, in 1859, against Shrine, as administrator upon the estate of the wife's father, for $6,500, and that certain negroes of the estate be sold, and one half the proceeds of such sale be paid over to the complainants, which decree was afterwards satisfied, and so entered on the minutes by payment of $10,200 by Shrine, but for which sum he really gave his two notes, payable to Redwine, one of which he paid, and the other was sued to judgment by Redwine, in 1862. Such note so sued to judgment, was not given for a negro consideration, and an injunction granted against the levying of the execution founded on such judgment, on the ground that it was based on a contract, the consideration of which was slaves, should have been dissolved. *Redwine vs. Glover*..... 134

2. Where a note was given for land, to an administrator, and he turned the note over as assets to the guardian of the sole heir-at-law, the maker thereof giving the guardian a new note, with the administrator as security, this was not such a novation of the original debt for the land as that the note is not still a debt contracted for the purchase of the land. *Lott vs. Dysart*. 355

3. The taking of the individual note under seal of a guardian by the husband of the ward, in settlement of the guardian's account, which note is payable to the husband, as trustee of his wife, and a receipt in full by

husband and wife to the guardian, whereby they release him "from any and all liability growing out of, or connected with said guardianship," and the further fact that the marriage settlement, under which the husband is trustee, limits the property settled (of which the note is part) to the wife for life, with remainder over, is a novation of the original debt of the guardian, and destroys its fiduciary character. And if parol evidence be introduced to show that the parties really intended to discharge the guardian, as such, and the Judge, by his charge, leaves the question of discharge to the jury and they find in the affirmative, this Court will not disturb the verdict. *Coleman vs. Davies*..... 489

4. When a note was given by principal and security, during the war, which, at the close of the war, was scaled to a gold standard, a new note given by principal alone for the amount thus scaled, and the new note accepted by the payee, in the discharge of the first note, this is a novation of the original contract, and the Relief Act of 1870 is inapplicable to it, and no payment of taxes was necessary. *Hamilton vs. Willingham*..... 500

OFFICERS. See *Municipal Corporations*, 2.

OPINION ON FACTS.

See *Charge of Court*, 2.

ORDINANCE OF 1865.

See *Limitation of Actions*, 1.
" *New Trial*, 16.

ORDINARY'S POWERS. See *County Matters*, 1.

PARENT AND CHILD.

1. A colored child, born before the 9th day of March, 1866, within what was regarded as a state of wedlock between its parents, while slaves, and who is acknowledged by its father, is the legitimate child of both parents. If the parents separated before that date and the child remained with the mother, she is entitled to the control of it during minority. But if she volun-

tarily yield the control to the father, and he takes the child away with him, she cannot afterwards resume the control without the assent of the father, no reason being shown why the father should not retain the custody of the child. *Mitchell et al. vs. McElvin*..... 558

2. If, under such circumstances, the mother is induced to sign articles apprenticing the child to a third person, under representations made to her by that person, that if she did not do so, he would send the child off to another State, out of her reach, the articles are void as against the rights of the father, and any master to whom he may have apprenticed the child; and on a writ of *habeas corpus* sued out at the instance of the person holding the articles from the mother against the father and the master to whom he had apprenticed the child, the child should have been remanded to the custody of the respondents; especially where the mother testifies that she does not desire to withdraw the child from the custody of the father, and that she was induced to sign the articles by the representations made to her. *Ibid.*

PARTNERSHIP

1. A suit against two as joint contractors, is not a suit against them as partners, simply because the bill of particulars attached to the declaration is an account against them by their several sirnames, the christian name of neither being mentioned, and the sirnames being connected with the character "&." *McArdle vs. Bullock & Radcliff*..... 89

2. When money was collected by one of a firm for a third person, and, with the full knowledge of the partners, was applied to the use of the firm, they are liable as partners, to the owner of the money for the debt, nor does it change the rule that one of the partners, other than the one collecting the money, considered the money advanced to the firm as part of the proportion of the partner collecting the money. *Houser & Bronson vs. Riley*..... 126

PARTY AS WITNESS.

See *Witness*, 1, 3, 5, 6.

PASSENGERS. See *Carriers*, 3.

PERSON OF COLOR.

See *Parent and Child*, 1, 2.

PLEADING.

1. A defendant in ejectment may set up an equitable defense in his plea, but is not obliged to do so; he may file his bill if he prefer it. *Elder vs. Allison*..... 13

2. A defendant in ejectment may set up an equitable defense by way of plea in Georgia. *Allison vs. Elder*... 17

3. It is too late for an administrator, after he has been, by *scire facias* made a party to a suit against his intestate and on a contract, to plead or object that the suit is such an one on its face, as must go on against the survivor alone. *McArdle vs. Bullock & Radcliff*. 89

4. A suit against two as joint contractors, is not a suit againt them as partners, simply because the bill of particulars attached to the declaration is an account against them by their several sirnames, the christian name of neither being mentioned, and the sirname being connected with the character "&." *Ibid.*

5. The defendant's pleas in a cause must clearly and distinctly set forth his defense, and are to be construed most strongly against him. *Threlkeld vs. Dobbins*.... 144

6. When there has been a settlement between the parties of an account, and one of the parties desires to open the settlement, on the ground of mistake, the pleadings should set forth distinctly the items of the mistake, and distinctly allege that such items were omitted. *Ibid.*

POSSESSORY WARRANT.

Where S. furnished land and the necessary means to make a crop to a freedman, under a contract that the crop was to be the property of S. until his advances were returned, for which purpose he was to sell the crop, and return any surplus to the freedman, and the cotton made was carried to the gin house of S., there ginned and packed and left for several days, this constituted sufficient possession in S. to enable him to sue

out a possessory warrant for the cotton, which had afterwards been secretly carried off by the negro and sold. *Allen, Preer & Ilges vs. Smith*..... 84

PRACTICE.

1. In a joint suit against two, even after a plea in abatement by one of misjoinder, the plaintiff may discontinue as to one, and if his proof sustains his action, as amended, he may recover against one alone. *McArdle vs. Bullock & Radcliff*..... 89

2. To read the direct answers to interrogatories and leave the other side to read the answers to cross-interrogatories, is not a correct practice. (R.) *Ibid.*

3. Where two actions are brought by the same plaintiff against the same defendant, in a Magistrate's Court, at the same term, on several promissory notes, given for the same consideration, at the same time, and payable to plaintiff, the defendant is entitled to have them consolidated: *Provided*, that, when consolidated, the aggregate amount does not oust the Court of jurisdiction. *Hartman vs. The Mayor and Council of Columbus*..... 96

4. In a joint suit against several, if one be not served, the plaintiff may dismiss as to the one not served; and if he go on to the jury and get a verdict, the verdict is good against those served, though there be a failure to dismiss against the defendant not served. *Stanford & Golden vs. Bradford et al*..... 97

5. The bankruptcy of the defendant is no reason why the Superior Court of this State should not hear and decide upon a motion to correct its minutes and make them speak the truth by entering *nunc pro tunc* upon its minutes, the verdict of the jury rendered years previously in a suit against the bankrupt. *Woolfolk et al. vs. Gunn*..... 117

6. When, after a judgment had been signed and execution issued, and several years had elapsed, a motion was made to put upon the minutes of the Superior Court the verdict of the jury in the case, which did not appear on the minutes, and it appeared that there was a verdict, in writing, signed by the foreman of

the jury of the proper term, and an entry upon the Judge's docket, in his own hand, of "verdict" in the case:

Held, That the question was one to be tried by the record; that no jury was required, unless affirmative issues of fraud were tendered. *Ibid.*

7. There was sufficient in the record to authorize the amendment. *Ibid.*

8. In granting the amendment the order should be so framed as that it should work no harm to any defenses to the judgment which any of the parties to the motion might have, growing out of the failure of the plaintiff to have his verdict entered at the proper time. *Ibid.*

9. It is in the discretion of the Judge of the Superior Court to consolidate two cases, sued in that Court, into one, on the motion of defendant. Such discretion will not be interfered with, unless abused. *Lewis vs. Daniel*..... 124

10. Under the Act of 1865 and 1866 (R. Code, section 3917,) a lost note may be established before the Superior Court. (R.) *Rowland & Tobiason vs. Daily*..... 129

11. The Act of 1865 and 1866, providing for the summary establishment of promissory notes, requires the party seeking to establish the same, to swear that he is the owner, or the agent, or the representative of the owner of the same, and if the affidavit is defective in this respect, the proceeding is null. *Ibid.*

12. A defendant who has appealed, had no right to withdraw his appeal, without the consent of the plaintiff. *Tommey & Stewart vs. Finney*... 155

13. When a railroad company institutes proceedings, under the provisions of their charter, against one as the owner of land, who is in possession thereof, for the assessment of damages for taking the land for the use of the road, such recognized owner will not be required to prove his title to the land at the time of the trial. *The Selma, Rome & Dalton R. R. Co. vs. Camp.* 180

14. A bill in equity may be amended when the *remittitur* from this Court is about to be made the judgment of the Court below, and before it is entered on the minutes of that Court. *King vs. King et al*..... 195

15. When the witness of one party has been examined by both sides, and has left the stand, the other party has no right to recall him, that he may cross-examine him upon a fact stated. If he pleases, he may recall and examine him as his own witness. *Gavan vs. Ellsworth*..... 283

16. In this State, when a defendant in a suit at law might, by going into equity for specific performance, defeat the plaintiff's action at law, he may set up his equitable defense at law. *Cook vs. Pridgen, Stapler & Dunn*... 331

17. When, on the trial of a suit founded on a debt contracted before June, 1865, in which the affidavit required by the Act of 13th of October, 1870, was duly filed, the defendant, on the calling of the cause, and the announcement that both parties were ready, moved to dismiss the suit because the plaintiff had not sustained the affidavit, and the Court overruled the motion, and, subsequently, on the offering of the note in evidence, objected to the evidence on the same ground, and on the plaintiff closing his case, made no motion to non-suit, and after verdict for the plaintiff, made no motion for a new trial, but filed his bill of exceptions to the ruling of the Court in the premises:
Held, That the Judge committed no error to justify this Court in setting aside the verdict. *Booth et al. vs. Butts*..... 367

18. If one of the counsel makes marginal marks on a paper which goes out with the jury to direct himself in argument, it is no error in the Court to refuse to compel him to rub them out before the paper goes to the jury—it not appearing that those marks conveyed any idea affecting the merits of the case. *Simms vs. Ferrill*..... 585

PRACTICE IN SUPREME COURT.

1. When, in a murder case, counsel for plaintiff in error arrived late, because he was sick, and it was then discovered that the brief of evidence had not been sent up, time was given to procure it; and, by consent, it was made part of the record, and the case proceeded. (R.) See end of report. *Lloyd vs. The State*..... 57

2. It is too late to move to dismiss a case here, for want of filing of the bill of exceptions, in the Clerk's office below, after the opening argument for plaintiff in error is concluded. (R.) *Davis vs. Bagley et al.*... 108

3. It need not appear when the Court adjourned, if it appear that the bill of exceptions was tendered to the Judge, and certified within thirty days from the beginning of the Court. (R. See end of report.) *Benjamin et al. vs. Gill* 110

4. The Court below adjourned on the 15th of March, and the bill of exceptions was not certified till the 15th of April thereafter. The bill of exceptions was dismissed because it was not certified within thirty days from the adjournment of the Court. (R.) *McKibbon et al. vs. Folds*..... 141

5. If A and B are contending for money, in the hands of a Receiver, a bill of exceptions will not be dismissed because said Receiver is not made a party (R. See report.) *Morrison, Heard & Company vs. Ponder et al*..... 167

6. If a case is submitted to the Court to decide both as to the law and the facts, a writ of error will lie to his decision, though it is not so stipulated in the submission. (R. See report.) *Ibid.*

7. A ground of error, not distinctly set forth and excepted to in the bill of exceptions, will not be considered by this Court merely because the facts are stated in the bill of exceptions. *Gavan vs. Ellsworth*..... 283

8. If a case be called and dismissed for want of prosecution, and before the next case is called, counsel for plaintiff in error appear and ask that the case be heard, and the order of dismissal be not taken, the case will be heard. (R. See end of report.) *Collins vs. Richardson et al*..... 291

9. The following order in said cause explains itself: "It appearing that the bill of exceptions purports to be an established copy of the lost original, and it also appearing from the record that a motion is still pending to establish said lost original, it is ordered that said case be continued, and that counsel have leave to withdraw from the files of this Court the said purported established original, for use in the motion

pending in the Court below." *Underwriters' Insurance vs. Southerlin* 312

10. Greer, one of the defendants in error, died after the bill of exceptions was sued out. His estate was unrepresented when the cause was called here, on the 8th of August, 1871. The Court granted an order that plaintiff in error, at the next term, might open the record and proceed to a trial, and ordered that said order be published sixty days before said next term. On July 26th, 1872, it was dismissed, and judgment affirmed, because plaintiff in error had taken "no legal steps" to have Greer's representative made a party defendant *ad interim*. He had failed to have said order of 1871 published, as required. *Henderson vs. Greer et al* 313

11. This case was tried below upon issuable pleas, filed by the securities upon the administrator's bond. The principal filed no plea. The jury found for the securities, but made no finding as to the principal. The plaintiff brought the cause here, averring errors, etc. Here, upon consent of counsel, this Court ordered that the judgment below should be affirmed, "provided nothing in this order shall be so construed as to preclude the plaintiff from proceeding against said principal in the Court below." *Worrell vs. Adams et al.* 313

12. Where a new trial is granted, and the judgment of the Court granting a new trial is excepted to, the plaintiffs in error cannot assign error upon the charge of the Judge to the jury. *Nunez & Company vs. Southern Express Company* 314

13. There was no entry of service upon the bill of exceptions, and for want of service defendant moved to dismiss the cause. Plaintiff's counsel said if time was given, he could prove that a copy of the bill of exceptions was served upon the party or his counsel. The Court replied that time could not be given; that service must appear on the bill of exceptions, by an acknowledgement, or by a return of an officer or affidavit of the party perfecting it, and dismissed the cause. *Coleman vs. Ransom & Co. et al.*... 316

14. When this cause was called here, counsel for plaintiff in error moved to withdraw the record. Defendant's

counsel objected, insisting that the cause should be argued and decided. As it was not to reverse a judgment for money, the Court held that it could be withdrawn, and that if it were a money judgment, plaintiffs could not withdraw without defendant's consent, as she would have a right to have the cause heard and ask for damages for delay. *Ransom & Co. vs. Coleman*..... 316

15. The certificate of the Clerk should identify the papers sent up. (R.) *Prothro et al. vs. Wood et al*..... 330

16. The Clerk having certified the record of a case different from the case mentioned in the bill of exceptions, the writ of error was dismissed. (R.) *Bullock, Gov., vs. Chisolm et al*..... 341

17. After the case was dismissed for want of proper certificate by the Clerk, a proper certificate was procured and a motion made to reinstate the case, the motion was overruled. (R.) *Ibid.*

18. A writ of error brought by one, alleging error made against him as agent for the State, will not be dismissed because, since the suing out of the writ of error and before the hearing here, he was removed from such agency. (R.) See end of report. *Printup vs. The Cherokee R. R. Co.*..... 365

19. Where one of the executors of a will to which a caveat has been filed married the sister of the wife of one of the Judges of the Supreme Court, said Judge is not disqualified from presiding by reason of relationship by affinity to said executor upon the trial of said cause before the Supreme Court. *Deupree et al. vs. Deupree et al.*..... 414

20. The Circuit Judge, having in his certificate attached to the original bill of exceptions and presented with the petition for *mandamus* to the Supreme Court, stated his reasons for failing to certify and sign the same, a *mandamus nisi* is not necessary. (R.) *Dougherty vs. Harvey*..... 618

21. The Court, not being clear from the record and the bill of exception that the dissolution of injunction complained of was not a final disposition of the cause, so far as the injunction is concerned, will direct the

bill of exceptions to be signed, though presented more than fifteen days after the judgment complained of. (R.) *Ibid.*

PRESUMPTIONS.

1. Where a judgment has been obtained since the adoption of the Constitution of 1868, the Court will presume that if the contract on which it was founded was for the purchase of slaves, or for the hire thereof, it would have been pleaded and proved on the trial at which the judgment was obtained. *Delony vs. Fort*.. 122

2. A levy of a mortgage *fi. fa.* on personal property, more than sufficient in value to pay it off, is *prima facie* a satisfaction. The fact that a large portion of such property was applied by plaintiff and defendant in *fi. fa.*, by way of compromise of the claims of other creditors of defendant, will not affect the right of contesting creditors or claimants to have the *fi. fa.* credited, so far as their rights are concerned, with the value of all the property levied on. *Chisholm vs. Chittenden & Company*..... 213

3. The legal presumption is that the Ordinary performed his duty in regard to the protection of the assets of the estate, before accepting the renunciation of one of the executors nominated in the will. *Deupree et al. vs. Deupree et al*..... 414

4. Where, on a bill filed by legatees under a will against the executor for an account, the only issue submitted to a jury was whether a receipt held by the executor, signed by the testator, was a good discharge of certain notes held by the testator against the executor, and the bill charged that the receipt was obtained by undue influence, and whilst the testator was not of sound mind, and the answer set forth the receipt in full and relied on it, and the original was, under order of the Judge, deposited for inspection, and it plainly appeared on its face that certain words and figures therein had been altered, but there was nothing to show that the alterations were made subsequently to the signing:

Held, That as the plaintiff allowed the receipt to go in evidence without any objection to it, on the ground of its alteration, and there was nothing in the evidence

to show that the alterations were not made previously to the signing of the same by the testator, the presumption of law is that the alterations were made previously, and it was not competent for the jury to find against the validity of the receipt on the ground of the apparent alterations. *Thrasher vs. Anderson et al.*.. 538

PRINCIPAL AND AGENT.

An executory contract for the sale of goods to be delivered at a future day, where both parties are aware that the seller expects to purchase himself to fulfill his contract, and no skill and labor or expense enters into the consideration, but the same is a pure speculation upon chances, is contrary to the policy of the law and can be enforced by neither party. But where such a contract is executed, an agent employed by his principal to make the contract can recover from him any money he may have advanced in the transaction by his authority, or without authority, if the principal, after such advance, ratify his agent's act in making it. *Warren, Lane & Co. vs. Hewitt*..... 501

PRINCIPAL AND SURETY.

When a case is carried to the Supreme Court by defendant, and a *supersedeas* bond given, on affirmance of the judgment the plaintiff is entitled to have a *fi. fa.* issued against both the principal and surety, without entering up formal judgment upon the bond. *Young vs. Wise*..... 81

PROMISSORY NOTES.

1. Where S. is sued on a warranty of the soundness of a negro, and in a settlement of the case gives his promissory note for half the amount for which he originally sold the negro, such note is not a "debt, the consideration of which was a slave." *Lyons vs. Stephens*..... 141

2. Where S. is induced to give his note to L. in settlement of a suit by the latter on a warranty of soundness of a negro, on the representation of L., that he had been compelled by suit to pay a third person, to whom he had sold him, and for which judgment had

been obtained against him on account of unsoundness of the negro, when, in fact, he had only paid a part of the judgment; the statement of L. is not such a misrepresentation of a material fact as constitutes a good defense to the note when sued on by L. *Ibid.*

RAILROADS.

1. In the assessment of damages to the owners of property, caused by the location and use of a railroad, the actual damage resulting directly from an invasion of their rights of property by the railroad company, is the measure of damages to be rendered. *The Selma, R. & D. R. R. Co. vs. Camp*..... 180

2. The Central Railroad and Banking Company cannot be served with a summons of garnishment by serving *any one* of its agents. The service must be on the president of the company. *Clark vs. Chapman et al*... 486

3. The Central Railroad and Banking Company has, by law, its principal office of business at Savannah, and it cannot be required to answer a summons of garnishment in any other county than the county of Chatham, unless it appear on the record that the debt it is charged to owe is within some of the statutes authorizing corporations to be sued out of the county where the principal business office is situated. *Ibid.*

4. Where several owners of land lying on the line of a projected railroad make a written agreement, that if the road is located as projected, they will grant to the company the right of way over their land, and the road is accordingly so located and built, the owners of the land are estopped from claiming damages, for the running of the road through their land, and on trial, under charter for ascertaining the value of the fee simple right to the land used, that value is to be counted on, so far as it had value over and above the right of way. *Macon & A. R. R. Co. vs. Bowen*..... 531

5. The grant of the right of way over land in consideration of the location of a railroad as projected, is not revocable after acted on. (R.) *Ibid.*

RECONSTRUCTION.

See *Constitutional Law*, 2, 3, 4, 5.

RECOUPMENT. See *Set-off*, 4.

REFORMATION OF CONTRACTS.

See *Equity*, 9, 10, 11.

RELIEF ACT OF 1868.

1. An affidavit to open a judgment, upon the sole ground that the defendant is willing to return to the plaintiff in *fi. fa.* the property, the purchase of which created the debt on which the judgment is founded, should have been dismissed and the sheriff ordered to proceed with the sale. *Beall vs. Coates et al*..... 512

2. The second section of the Relief Act of 1868 allows the defendant to avail himself of such equitable defense by motion, in place of filing a bill in the class of cases therein mentioned. *Fannin vs. Thomasson*... 533

3. But where, in an issue formed upon an affidavit of illegality, under that Act, the defendant in *fi. fa.* proves that plaintiff promised to take seven-thirty Confederate notes or Georgia State bonds issued during the war, in payment, and that he, induced by the promise, bought such notes and bonds "with what money he had, (meaning Confederate money,) and sold some cotton," (it not appearing how much cotton or to what extent defendant was damaged) to raise the balance, and then tendered the bonds and notes to the plaintiff, which he refused, in consequence of which defendant held them, and they became worthless in his hands, and the jury found for the defendant, a new trial should have been granted. No damage is sufficiently proved to constitute a good equitable defense to the execution. *Ibid.*

RELIEF ACT OF 1870.

1. When a *fi. fa.*, founded on a debt due before June, 1865, was about to proceed to levy, and the plaintiff, in lieu of the affidavit required by the fifth section of the Act of October, 1870, filed an affidavit that the judgment, which was in his own name, as well as the debt on which it was founded, belonged in fact to one who was a minor, and who continued a minor until

the spring of 1870, and the levy being made, the Judge of the Superior Court, on motion, dismissed the same:

Held, That the affidavit did not show that the note belonged to one who was a minor at the date of the Act, and that there was no error in dismissing the levy. *Jones vs. McGehee et l.*..... 21

2. A suit against a warehouseman for failing, in 1866, to deliver to plaintiff two certain bags of cotton, which had, in 1864, been deposited in defendant's warehouse under a contract then made to deliver them when called for, is not within the provisions of the Act of October 13th, 1870, in relation to the payment of taxes. Until the demand and failure to deliver there was no taxable debt, owing from the defendant to plaintiff. *Dawson vs. Ivy & Garrard*..... 22

3. An action against an Express Company for a breach of contract, in failing to deliver plaintiff's goods according to contract, when the failure to deliver, as well as the contract, is alleged to be before June, 1865, is within the Act of October 13th, 1870, an affidavit must be filed, as required by the first section of that Act. *Alexander vs. The Southern Express Co*..... 24

4. The first, second, third and fourth sections of the Act of 13th October, 1870, requiring the plaintiff in suits founded on debts contracted before the 1st of June, 1865, to prove that all legal taxes due thereon have been paid before he is entitled to a judgment, does not apply to a plaintiff in *fi. fa.* in a claim case, if the affidavit is made that justifies the levy, and the claimant cannot require proof unless he make an issue by a counter-affidavit, denying that the legal taxes have been paid. *Anderson vs. Wilson*..... 25

5. When cotton was loaned, during the late war between the Confederate and United States, and a contract entered into for the return of the same quality and quantity of cotton to the lender at the end of the war, or at any time agreed upon between the parties, the contract is subject to the Relief Act of 1870, and the tax affidavit must be attached to the *fi. fa.* issued upon a judgment founded on such contract, before levy. *Young vs. Wise*..... 81

6. Where plaintiff in *fi. fa.* makes the tax affidavit, and defendant files a counter-affidavit denying that the taxes have been paid, as defendant is informed and believes, the issue as to the payment of the taxes should be submitted to the jury. *Ibid.*

7. A non-resident plaintiff in *fi. fa.*, whose judgment was obtained on a debt contracted prior to June, 1865, may claim money brought into Court by junior judgments without attaching the affidavit of payment of taxes required by the Act of 1870, when his non-residence appears by affidavit or other proof. *Peters vs. Bradford et al*..... 93

8. It is sufficient to excuse the filing of an affidavit, as required by the Act of October 13th, 1870, that the plaintiff alleges in his declaration, or claims before the Court that he is and has been a non-resident, it must be shown to the Court by the plaintiff's oath, or by other proof, that the fact of such non-residence is the truth. *Kellog vs. Brooks*..... 99

9. Where A sues "as the guardian of the minors" of B, on a contract originating before June, 1865, he is entitled to amend his declaration by alleging that the note sued on is the property of C, one of the minors, and that she is still a minor, and if he prove the allegation, it will excuse the filing of the affidavit required by the second section of the Relief Act of 1870. *Johnson vs. Little et al*..... 106

10. A widow need not make the affidavit of payment of taxes required by the Act of October 13th, 1870. *Delony vs. Fort*..... 122

11. Where a judgment has been obtained since the adoption of the Constitution of 1868, the Court will presume that if the contract on which it was founded was for the purchase of slaves, or for the hire thereof, it would have been pleaded and proved on the trial at which the judgment was obtained. *Ibid.*

12. It is unnecessary to file an affidavit of taxes paid, as required by the Act of October 13th, 1870, in an action for false representations of the solvency of one whom the plaintiff was thereby induced to credit, and in consequence of which it was alleged plaintiff had lost his debt. *Collins vs. Richardson et al*..... 291

13. Whether a citizen of Georgia is liable to pay taxes on an open account due him by a non-resident—*Quœre? McCrosky vs. Mabry*..... 327

14. That a plaintiff is now a non-resident of the State is not, of itself, sufficient to excuse the filing of an affidavit of taxes paid under the Act of October 13th, 1870. It must appear that he was a non-resident at the contracting of the debt, and has so continued, so that no taxes could have been due on the same to this State. *Allison, Anderson & Co. vs. Graham*..... 353

15. Where, in a suit pending on a debt, dated June 1st, 1865, the plaintiff had filed the affidavit required by the Act of October 13th, 1870, and on the trial failed to show that the taxes due upon the debt had been paid for a part of the time since the debt was contracted, but proposed, in open Court, then and there, to pay into Court for the use of the State the taxes still due:

Held, That it was error in the Court to deny him the right so to pay the full amount of taxes due. Such a payment would have been a substantial compliance with the Act of October 13th, 1870, and the plaintiff would have been entitled to a judgment on his debt. *Lott vs. Dysart et al*..... 355

16. Where a note was given for land, to an administrator, and he turned the note over as assets to the guardian of the sole heir-at-law, the maker thereof giving the guardian a new note, with the administrator as security, this was not such a novation of the original debt for the land as that the note is not still a debt contracted for the purchase of the land. *Ibid.*

17. In a suit by an administratrix on a debt contracted before June, 1865, where it is made to appear that there are no debts, and that the persons entitled to the estate are a widow and minor children, the case is within section fourteen of the Act of October 13th, 1870, and no proof of payment of taxes is required. *Redwine vs. Hancock et al*..... 364

18. When, on the trial of a suit founded on a debt contracted before June, 1865, in which the affidavit required by the Act of 13th of October, 1870, was duly filed, the defendant, on the calling of the cause and the

announcement that both parties were ready, moved to dismiss the suit because the plaintiff had not sustained the affidavit, and the Court overruled the motion, and subsequently, on the offering of the note in evidence, objected to the evidence on the same ground, and on the plaintiff closing his case, made no motion to nonsuit, and after verdict for the plaintiff, made no motion for a new trial, but filed his bill of exceptions to the ruling of the Court in the premises:
Held, That the Judge committed no error to justify this Court in setting aside the verdict. *Booth et al. vs. Butts*... 367

19. A bill of interpleader being filed by an administrator against the creditors of the estate represented by him, whose claims are antagonistic, and some of the claims being founded on contracts entered into before June, 1865, it is not necessary for creditors holding such claims to file an affidavit of the payment of taxes with their answers, their claims having been brought into Court by the administrator, and not by themselves. On the trial of the case, however, they should make it clearly appear that the taxes have been paid to entitle them to a decree for the payment of the claims. *Johnson vs. Sayre et al*..... 370

20. Subscriptions to the stock of the Macon and Augusta Railroad Company, made before June, 1865, stand upon the same footing with other debts contracted before that date; and in suits against the subscribers for the amount of their subscription, the payment of taxes and the filing of the affidavit, as required by the Relief Act of 1870, is necessary. WARNER, Chief Justice, dissenting. *Ibid.*

21. When a note was given by principal and security, during the war, which, at the close of the war, was scaled to a gold standard, a new note given by principal alone for the amount thus scaled, and the new note accepted by the payee, in the discharge of the first note, this is a novation of the original contract, and the Relief Act of 1870 is inapplicable to it, and no payment of taxes was necessary. *Hamilton vs. Willingham*..... 500

22. When a set-off had been pleaded to the plaintiffs' action, it was error to allow the plaintiffs, on their

own motion, to dismiss their own action, on the ground of their own default in not having paid all legal taxes on their own debt, as required by the Act of 1870. *Scruggs vs. Gibson et al*..... 509

REMOVAL TO UNITED STATES COURTS.

When the administrator files a bill to marshal assets against creditors, some of whom are proceeding to enforce their claims at law, and seeks to enjoin the common law suits, alleging conflict in the claims, and the Judge grants the injunction, subject to the limitation that "the said several creditors and said administrator go on and litigate the several claims now in process of litigation for the purpose of ascertaining the amounts due said creditors, and for that purpose only, and that as to the priority and dignity of said claims, and as to the rights of said creditors to claim payment out of said funds in the hands of the administrator, that the same be reserved and held up for future determination of this Court, and that the judgment that said creditors may obtain against said administrator shall not create any personal liability as to him, but against the assets of the estate only :" one of said creditors, who is a non-resident, cannot remove his common law suit to the Circuit Court of the United States. Such suit is collateral to the equity cause. *Burts vs. Loyd*..... 104

RES ADJUDICATA.

1. The judgment on a mechanic's lien, under the Act of December 22, 1834, made general by Act of December 28, 1837, is not a judgment *in rem*, and hence does not conclude those claiming under a title adverse to the title of him who created the lien. *Stroupper vs. McCauley et ux*..... 74

2. When a bill of exceptions was carried to the Supreme Court without a motion having been made in the Court below for a new trial, which bill of exceptions was dismissed, and the plaintiff in error, at a subsequent term of the Superior Court, makes a motion for a new trial, he can only include in the motion such grounds as were not included in the bill of exceptions. The fact that some of those grounds were imperfectly

stated, and might possibly have been stricken out on motion of defendant in error, does not vary the rule. *Perry et al vs. Gunby*.. 100

3. There being some evidence to show a misrepresentation of a material fact by the plaintiff in error in this case, which was acted on by the defendant in error, the judgment of the Court below refusing a new trial on the allegations that the verdict was contrary to evidence and the weight of evidence and contrary to law and the equity and justice of the case, will not be disturbed. *Ibid.*

4. Where a factor is sued in another State for the price of goods consigned to him, which he had sold, and pleads that he has fully accounted with his consignor, and paid him, which suit is determined against him, and judgment rendered in favor of the consignor, the factor is estopped from afterwards suing the consignor for expenses incurred in preparing said goods for sale and for freight paid by him on the goods, and advances made upon them and commissions, where such former judgment is pleaded against him. *McCroskey vs. Mabry*..... 327

RESCINDING CONTRACTS. See *Sales*, 2.

RES GESTÆ. See *Evidence*, 5.

RESTRAINT OF TRADE. See *Equity*, 2.

RIGHT OF WAY. See *Railroads*, 1, 4, 5.

RULE AGAINST SHERIFF.

See *Homestead*, 1.

SALES.

1. Where claimants were deceived by misrepresentation, and gave credit to the defendant in *fi. fa.*, on the faith of it, that vitiates the sale, if they elect so to do. *Chisolm vs. Chittenden & Company*..... 213

2. When A sold goods to B and received in payment certain tea-pots, spoons, forks, etc., at so much per ounce, B representing them to be sterling silver, im-

ported by him, he knowing them to be merely plated and of small value, and A took the articles on the faith of B's representations:

Held, That A may tender back the goods, treat the payment or sale of the articles to him as fraudulent and void, and sue for the price of the goods. *Straus vs. Herman*..... 222

3. An executory contract for the sale of goods, to be delivered at a future day, where both parties are aware that the seller expects to purchase himself to fulfill his contract, and no skill and labor or expense enters into the consideration, but the same is a pure speculation upon chances, is contrary to the policy of the law, and can be enforced by neither party. But where such a contract is executed, an agent employed by his principal to make the contract can recover from him any money he may have advanced in the transaction by his authority, or without authority, if the principal, after such advance, ratify his agent's act in making it. *Warren, Lane & Company vs. Hewitt*..... 501

4. Under the provisions of the Code, the vendor of a chattel (in the absence of any express warranty) warrants that the article sold is merchantable, and reasonably suited to the use intended, and that he knows of no *latent* defects undisclosed, and a partial failure of consideration may be pleaded to such sale against the vendor of the chattel, when the defect in the chattel was not *apparent* to the purchaser at the time of the sale and not *disclosed* by the seller, especially when the evidence shows that the vendor knew of the defect in the chattel sold prior to the sale. *Williams & Lee vs. Wylly*..... 580

SCHOOLS. See *Education*, 1.

SCIRE FACIAS.

1. Where the sureties on a criminal bond, which has been escheated, and on which the usual *sci. fa.* was issued, offer, on a motion to enter up judgment on the bond, at the return term of the *sci. fa.*, to prove the principal is too sick to appear, they should be permitted to do so. The proof made, it would entitle them to a continuance. *Russell et al. vs. The State*..... 9

2. Where judgment has been entered on such a bond, at the return term of the *sci. fa.*, and, during the term and before the juries were discharged, the sureties brought their principal into Court, surrendered him to the sheriff, offered to pay all costs and excuse themselves for not bringing their principal sooner, by showing his serious illness, and then moved to vacate the judgment, the motion should have been allowed. *Ibid.*

SERVICE.

1. The Central Railroad and Banking Company cannot be served with a summons of garnishment by serving *any one* of its agents. The service must be on the president of the company. *Clark vs. Chapman et al...* 486

2. The Central Railroad and Banking Company has, by law, its principal office of business at Savannah, and it cannot be required to answer a summons of garnishment in any other county than the county of Chatham, unless it appear on the record that the debt it is charged to owe is within some of the statutes authorizing corporations to be sued out of the county where the principal business office is situated. *Ibid.*

SET-OFF.

1. A debt due by the plaintiff to one of several defendants in a suit cannot be pleaded by the defendants as a set-off, unless there be some special cause shown; and an agreement by the plaintiff that such debt shall go as a credit on his claim against both, is such special cause. *Threlkeld et al. vs. Dobbins*..... 144

2. Where two parties settle a running account between them, and the debtor consents, after the balance is struck, that the amount found due shall be credited on a promissory note held by him against the creditor and another, and the credit is made accordingly:
Held, That is no agreement that an additional sum, then in fact due on the account, but, by mistake, not credited on it at the settlement, shall also be put as a credit on the note. *Ibid.*
3. When A brought an action against B on a promissory note, and for the value of a bag of cotton belonging to

A, but appropriated by B to his own use, and B pleaded the general issue that the note was given for money won at cards by B's partner, and it appeared, in proof, that the note was in part for money won at cards, and that more money had already been paid on the note than was due on it after deducting the gaming consideration:

Held, There being no plea of set-off filed, that the jury could not apply the money paid on the note to the discharge of the debt due for the bag of cotton. *Lovejoy & Co. vs. Chisolm* 146

4. When a defendant filed his plea to the plaintiff's action, alleging that the plaintiff agreed to do certain things, on his part, to enable the defendant to procure the title to a tract of land, so as to enable him to convey the title thereto to the plaintiff, which were specially set forth in the plea, and that this was part and parcel of one and the same contract, the defendant has been damaged to the amount for which the plaintiff has sued him, and claimed the right to recoup the same amount, by way of damages, from the plaintiff for the breach of the contract on his part, and to set off the damages sustained by him against the plaintiff's demand:

Held, That the Court erred in sustaining a general demurrer to the defendant's plea, and ordering the same to be stricken from the record. *Latimer vs. Lane*..... 474

5. When a set-off had been pleaded to the plaintiff's action, it was error to allow the plaintiff's, on their own motion, to dismiss their own action, on the ground of their own default in not having paid all legal taxes on their own debt, as required by the Act of 1870. *Scruggs vs. Gibson et al.* 509

SHERIFFS.

A sheriff has no authority to put a purchaser of real estate, at a sheriff's sale, in possession, if to do so it is necessary to turn out a purchaser from the defendant in execution, whose title is anterior to the date of the judgment, even though it be true that, for some reason, the judgment was a lien anterior to its date, so that the purchaser gets a good title. *Seymour vs. Morgan*..... 201

SLAVE DEBT.

See *Constitutional Law*, 9.
See *Illegality*, 1.
See *Presumptions*, 1.
See *Promissory Notes*, 1, 2.

SPECIFIC PERFORMANCE.

See *Equity*, 3.
See *Statute of Frauds*, 2, 3.

STATE A PARTY.

1. The State of Georgia cannot be made a party defendant in a suit in any Court, except by consent of the proper authorities; nor can this be done so as to affect the rights of the State by making the agent of the State, appointed by its authorities, a party; and any judgment against such agent cannot affect the rights of the State, or affect its position. *Printup vs. Cherokee R. R. Co*..... 365

2. A writ of error brought by one, alleging error made against him as agent for the State, will not be dismissed because, since the suing out of the writ of error, and before the hearing here, he was removed from such agency. (R. See end of report.) *Ibid.*

STATUTE OF FRAUDS.

1. Where A, a merchant, is indebted to B and C, and sells his goods to B for more than his indebtedness to him, and while B is in the act of taking possession of the goods, and of removing them out of the county, C threatens to sue out an attachment against the goods for his debt, in consequence of which threat, B promises that the surplus over and above his debt should go to the payment of the debt of C; whereupon, C, relying on such promise, desists from suing out the attachment, the promise is an original undertaking on the part of B, and not a promise to answer for the debt, default or miscarriage of another, and hence need not be in writing. *Davis vs. Banks et al*..... 138

2. The Statute of Frauds requires that any contract for the sale of lands or any interest in or concerning them,

must be in writing, signed by the party to be charged therewith, or by some person by him lawfully authorized; but the Statute of Frauds does not extend to cases where the contract has been *fully executed*, or where there has been performance on one side, accepted by the other, in accordance with the contract. *Rawlins vs. Shropshire*..... 182

3. Full payment alone accepted by the vendor, if clearly proved with reference to the parol contract, will be sufficient part performance to justify a Court of equity to decree a specific performance of such parol contract for the sale of land. *Ibid.*

4. To allow the vendor of the land or his legal representative to retain the land and the purchase-money paid therefor, as against the vendee and those claiming under him, would be a fraud upon the latter which a Court of equity will not permit or sanction. *Ibid.*

5. A parol license to one to enjoy a permanent easement upon the land of another, (as to back water upon it,) is an interest in the land, and must be in writing, by the Statute of Frauds, and is void at law. *Cook vs. Pridgen, Stapler & Dunn*..... 331

6. But if the licensee, in pursuance of the license, goes forward, and for the enjoyment of the easement makes large investments, and the easement be one in its nature permanent, equity will decree a specific performance as in other cases of a part performance, by one party, of a parol contract for the sale of lands. *Ibid.*

STREETS. See *Dedication*, 1.

TAXES.

1. The writ of prohibition does not lie against a tax collector who is alleged to be proceeding to levy an illegal tax. The parties complaining must pay the tax, and then pursue their remedy against the tax collector as an individual. *Cody et al. vs. Lennard*..... 85

2. Whether a citizen of Georgia is liable to pay taxes on an open account due him by a non-resident? *Query.* *McCroskey vs. Mabry*..... 327

See *Relief Act of* 1870.

THREATS. See *Criminal Law*, 22, 23.

TRESPASS. See *Injunction*, 1.

TRUSTEE. See *Equity*, 17.

VERDICT.

1. Under the usual issue formed in a claim case, it is not competent for the plaintiff in *fi. fa.* to have an accounting between the claimant and the defendant in *fi. fa.*, and to have the verdict so moulded as to subject to his debt any amount which might be found in the hands of the claimant, belonging to the defendant, even where such sum may have been paid by defendant to claimant, in part payment for an amount of goods (a part of which are the subject-matter of controversy,) which had been sold by claimant to defendant, but which sale claimant had elected to rescind, because of false representations by defendant, at the time of sale; especially when the claimant on his election to rescind the contract, tendered the money received by him to defendant in *fi. fa.*, and which the latter refused. If the plaintiff desires to have such amount subjected to his execution, he must so frame his pleadings as to put the claimant upon notice. *Chisolm vs. Chittenden & Co*..... 2

2. A juror's affidavit will not be received to impeach his own verdict. *Westmoreland vs. The State*..... 2

WAIVER.

1. It is too late for an administrator, after he has been, by *scire facias*, made a party to a suit against his intestate and another on a contract, to plead or object that the suit is such an one on its face, as must go on against the survivor alone. *McArdle vs. Bullock & Radcliff*.....

2. When judgment was obtained at common law against the makers and indorser of a note, and an appeal entered, which was afterwards dismissed, and subsequently the indorser is again sued on the note and permits a judgment to be taken against him by default, he cannot, by affidavit of illegality, attack such second judgment on the ground that a prior judg-

ment unreversed existed against him for the same debt. He should have made this defense to the second action. *Lewis vs. Armstrong et al*..... 131

WAREHOUSEMAN. See *Relief Act of* 1870, 2.

WARRANTY.

Under the provisions of the Code, the vendor of a chattel (in the absence of any express warranty) warrants that the article sold is merchantable, and reasonably suited to the use intended, and that he knows of no *latent* defects undisclosed, and a partial failure of consideration may be pleaded to such sale against the vendor of the chattel, when the defect in the chattel was not *apparent* to the purchaser at the time of the sale and not *disclosed* by the seller, especially when the evidence shows that the vendor knew of the defect in the chattel sold prior to the sale. *Williams & Lee vs. Wylly*..... 580

WATER-COURSES. See *Statute of Frauds*, 3.

WILLS.

1. The marriage of a testator or the birth of a child to him subsequent to the making of a will, in which no provision is made in contemplation of such an event, is, by presumption of law, a revocation of the will, and this presumption cannot be rebutted by any declarations of the testator, whether by parol or in writing, at the time of the marriage, or even by a settlement on the wife, and a renunciation by her of all interest in the estate of the husband, unless the declarations or provisions be testamentary in their character, and be executed by the testator with the forms and solemnities required for making a will. *Deupree et. al. vs. Deupree et al*..... 415

2. A paper testamentary in its nature does not require for its due execution, an attesting clause declaring it a will, and reciting its execution according to the terms of the statute, pointing out how wills shall be executed. If it be subscribed by the testator, in the presence of the witnesses, and be attested and subscribed by them in his presence, it is sufficient. *Ibid.*

THREATS. See *Criminal Law*, 22, 23.

TRESPASS. See *Injunction*, 1.

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VERDICT.

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Where the first clause of a will contains the following provision: "First, my wife is to have the use of the house, furniture, carriages, horses, and everything necessary for her comfortable support, together with an ample and sufficient support out of and from said plantation, during her natural life or widowhood. But, should she marry again, then, in that event, she is to have the following negroes only, to-wit: Phil and his wife, Kittie, and all their children, Eliza, Bella and her children, for and during her natural life; and at her death the said negroes are to be equally divided between my children by my said wife—these negroes to be all and everything my wife is to have out of my estate if she marries again." And the codicil to said will the following provision: "First, I revoke and annul so much of the first item of my will as gives a life-estate to my wife, Harriet, in and to the negroes Phil and his wife, Kittie, and their children and increase, Eliza and Bella, and, in addition to those negroes, I give her Rosa, one of the children of Susan; and I give my wife said negroes and their increase, forever in fee:"

Held, That the codicil does not adeem or revoke the first clause in the will, which charges the estate with the support of the testator's widow during her natural life or widowhood. (R.) *Colquitt & Bagg vs. Tarver*..... 631

3. The record of the probate of the will was notice to the mortgagees that the property specified therein was charged with the support of testator's widow, but would not be notice as to other property purchased since the testator's death with the trust funds arising from the sale of the encumbered property. (R.) *Ibid.*

WITNESSES.

1. In a claim case, the plaintiff in *fi. fa.* is a competent witness, under the Evidence Act of 1866, Revised Code, 3798, notwithstanding the defendant in execution may have died or become insane. The defendant has no interest in the result of trial, except with the plaintiff. *Anderson vs. Wilson*..... 25

2. When interrogatories are taken out by the defendant and crossed by the plaintiff, and both the direct and

cross-interrogatories are answered, and the defendant introduces and reads to the jury the answers to the direct interrogatories, failing to read the answers to the cross-interrogatories, and the plaintiff reads the answers to the cross-interrogatories, he does not thereby make the witness his witness, so that he cannot impeach him. The answers to take the direct and cross-questions, are the evidence of the party who offers to the jury the return of the commissioners. *McArdle vs. Bullock & Radcliff*..... 8

3. When the maker and indorser of a note are sued in the same action by the administrator of the indorsee, and the maker is dismissed from the action on account of his having received his discharge in bankruptcy, and the issue was whether the indorser was discharged by indulgence granted by the indorsee to the maker, the maker is a competent witness in behalf of the indorser to prove that the indorsee, in his lifetime, gave such maker indulgence on said note for a valuable consideration. *Hayden vs. McKnight*..... 1

4. Witnesses cannot be compelled, in civil causes, to attend Court out of the county of their residence. (R.) *Deupree et al. vs. Deupree et al*..... 4

5. On the trial of a bill filed by an administrator of an estate against the legatees and creditors to marshal the assets, one of the creditors is not a competent witness to testify as to the nature and character of his contract with the deceased, even though the witness only proposes to state facts showing the dignity of the contract, and affecting only its priority. *Latimer vs. Sayre et al*..... 4

6. When, in a proceeding, under sections 4005, 4013 of the Code, against one as a tenant holding over, the defendant denies the tenacy, and sets up that he entered as the owner, and not as tenant, and an issue is formed and on trial, and the assumed landlord dies, and his administrator is made a party, the defendant cannot be sworn as a witness in his own behalf, unless for the special purpose of proving some fact transpiring since the death of the alleged landlord. *Veal vs. Veal*. 5

YEAR'S SUPPORT. See *Distribution*, 2, 3.